DOCUMENT RESUME

ED 434 588 HE 032 366

AUTHOR	Weeks, Kent M., Ed.
TITLE	Lex Collegii. Volume 22.
INSTITUTION	General Board of Higher Education and Ministry, Nashville, TN.
ISSN	ISSN-0749-9078
PUB DATE	1998-00-00
NOTE	34p.
AVAILABLE FROM	College Legal Information, Inc., P.O. Box 150541, Nashville, TN 37215.
PUB TYPE	Collected Works - Serials (022)
JOURNAL CIT	Lex Collegii; v22 n1-4, Sum 1998-Spr 1999
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	Administrators; Age Discrimination; College Faculty; College Housing; College Students; Contracts; *Court Litigation; Disabilities; Faculty Evaluation; Higher Education; *Legal Problems; *Private Colleges

ABSTRACT

These four newsletters contain articles and columns on legal issues of interest to private colleges and universities (particularly those related to the United Methodist Church). Feature articles include: (1) "Administrators and Authority: Who Obligates the College?" which focuses on the conditions under which conflicts over alleged obligations may arise; "The Fiduciary Obligations of Faculty and Administrators," which addresses situations that may arise from the courts' willingness to characterize professors and administrators as fiduciaries of an institution; "College Housing: New Challenges to Old Services," which examines several recent challenges to residence hall policies that require students to live on campus and that affect disabled students; and "Age Discrimination and Performance Assessment," which focuses on the effects of the Age Discrimination in Employment Act on the employment and retirement of faculty. Additional features in some issues include Interrogatories, a column offering answers to readers' questions; a cumulative (1978-1998) topic index; and the College Legal Issues Higher Education Litigation Index, which reflects the legal terrain in which colleges operate. (Feature articles contain references.) (MDM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

Vol. 22, No. 1 Summer 1998

Lex Collegii

A Legal Newsletter For Independent Higher Education

ED 434 588

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

K. M. WEEKS

2

BEST COPY AVAILABLE

Vol. 22, No. 1 Summer 1998

Lex Collegii

A Legal Newsletter For Independent Higher Education

Contents

Administrators and Authority: Who Obligates the College? 1

Topic Index 1978-1998 6

Editorial Board

Kent M. Weeks
Editor and attorney

Paul Hardin
Attorney and former chancellor, University of North Carolina, Chapel Hill

Phil Moots
Attorney

Linda Lorimer
Attorney and secretary, Yale University

Vic Hahn
Attorney and vice president, Capital University

Lex Collegii
College Legal Information, Inc.
P.O. Box 150541
Nashville, Tennessee 37215

Administrators and Authority: Who Obligates the College?

Questions of authority and alleged promises can lead to conflicts in a variety of contexts on college campuses. For example, a faculty member may allege that the chief academic administrator made an oral commitment regarding eligibility for tenure. At some point, the faculty member may seek to enforce the alleged promise.

Athletic boosters or coaches may make commitments to potential recruits. The recruits enroll and then seek the benefit allegedly promised them by the institution.

Over zealous student recruiters may make commitments to potential applicants regarding their admission or scholarship aid. The applicant may then seek to enforce these oral promises.

In all of these cases, the institution may claim: (a) commitments were not made; (b) the person making the commitment did not have the actual authority to do so; (c) even if commitments were made, reliance on them was unreasonable.

The promisee or claimant on the other hand, may allege that the administrator was clothed with the authority to make the commitments or that reliance was reasonable and accordingly, the college must deliver on the promises.

Courts have developed a nomenclature regarding the nature of the particular authority at issue. Actual or express authority exists when the person making the commitments has the explicit power to make them. For example, when a president is authorized to hire new faculty.

Apparent authority can exist even when there is not actual authority. In these cases, courts may apply the doctrine of promissory estoppel where the institution, through words or conduct, represents that the agent has authority to act and the third party reasonably relies on these representations. Reasonable reliance is a critical element of this doctrine.

This article will analyze when administrators may bind the college or university and the conditions under which conflicts over alleged obligations may arise. Specifically, the article will focus on authority issues in the context of faculty employment, tenure promises, academic requirements, and business transactions.

Faculty Employment

Rank and Tenure

In a leading case, two nationally

recognized professors sued Johns Hopkins University for breach of contract. The two professors, Samuel Ritter and Rebecca Snider, who were husband and wife, claimed that Hopkins promised each a full professorship with tenure at the time they were employed by the Hopkins Medical School.

The Hopkins Medical School's division of pediatric cardiology was in "desperate" condition and needed new leadership. The specific leadership need was caused when Hopkins terminated its chief of pediatric cardiology and the director of the department of pediatrics, Frank Oski, launched a national search.

Ritter was a tenured professor of pediatrics at Cornell University and had an outstanding record in the field that Hopkins was looking to fill. Snider, who also had impressive credentials, was a tenured professor of pediatrics and had a subspecialty in cardiology at Duke University. They were married in January 1993 and at that time began searching for appointments at an institution at which both could teach.

Ritter, when he learned of the Hopkins search, contacted Oski and informed him of his and Snider's availability. Both doctors interviewed at Hopkins and returned for a second set of interviews in June 1993.

Following these visits, Ritter and Oski corresponded about the positions. Throughout this period of interviews, meetings, and letters it was the position of Snider and Ritter that they had been offered full professorships of pediatrics with tenure by Oski.

The letters of Oski, however, always stated that these appointments were proposed and that he could not promise the rank of professor. In his letters he set forth the salaries for the positions which were contingent upon their appointments to professor through the review process of Hopkins. This status was apparently acknowledged by Ritter in August 1993.

Ritter and Snider testified during the jury trial that they understood the formal process for attaining tenure which was set forth in the faculty handbook, also known as the "Gold Book." They testified, however, they were repeatedly assured by Oski that their appointments would be rubber stamped and would not be a problem. Ritter and Snider also testified they resigned their current positions in July 1993 because of their repeated assurances.

They also offered expert testimony that it was national practice, when hiring persons of their reputation at the professor level, that agreements were often made in advance of the formal process of appointment and tenure was in fact, a mere formality.

The administrator of the Hopkins Childrens' Center wrote the two professors in October 1993 confirming their employment at the professor level. The formal five step appointment process began in October 1993 when Oski recommended to the dean that Ritter and Snider be appointed to the rank of professors. The two professors started work at Hopkins in January 1994. Subsequently, their appointments as university professors of pediatrics were confirmed by the dean.

The process through the tenure review committees was slow. In the case of both Snider and Ritter, each received unanimous endorsements for rank of professor from the dean and various committees. The final process of approval by an advisory board and the board of trustees did not occur.

Snider and Ritter apparently encountered difficulty in working with their colleagues and with staff during the fall of 1994. Several of the staff and their colleagues made serious allegations about their ineffectiveness within the cardiology unit and the division. Ritter and Snider complained they did not have adequate resources to do their work as had been promised by the university.

There were two views on the problems the professors were having; one, from Snider & Ritter's perspective, that it was due mostly to inadequate support; and another by their colleagues who testified that they were creating serious problems for the division and within the medical school.

After the dean reviewed this information and after a meeting in October 1994, he determined the employment of Ritter and Snider should end. Oski notified Ritter and Snider they would not be rehired after December 31, 1994.

The doctors filed a lawsuit alleging breach of contract. (*Johns Hopkins University* v. *Ritter*, 1996) After a fifteen day jury trial, the doctors were awarded a judgment in the amount of $822,844. Hopkins appealed the jury determination.

The appellate court focused on two questions: (1) did Oski make assurances regarding appointment to a full professor with tenure; and (2) even if he did, did he have the apparent authority to make that commitment. The doctors argued that the procedures in the "Gold Book," were mere formalities and that their appointment would be rubber stamped. Hopkins asserted that the "Gold Book" policies, particularly in relation to tenure, must be followed and that the appointments of Ritter and Snider never received the ultimate approval of the advisory board nor the board of trustees.

The court ruled that the jury could find under the facts that Oski did promise the doctors they would be employed as full professors and that the appointment process would result in their appointments to full professors with tenure. The court then examined the issue of whether Oski had the authority to commit Hopkins.

The court ruled that Oski did not have either apparent authority nor did Snider and Ritter reasonably rely on his statements.

First, the court stated that there was no evidence anyone at Hopkins was aware of Oski's negotiations and that no one at Hopkins approved or gave Snider and Ritter any evidence that their understanding of the tenure process had been authorized by Hopkins.

In regard to the notion of reasonable reliance on Oski, the court said that the written correspondence clearly indicated that appointments to professors were subject to the process and there was no evidence that the established "written procedures for obtaining tenure would or could be effectively waived." Therefore, it was unreasonable for Ritter and Snider to believe Oski had the authority to bind Hopkins to a promise of tenure. Finally, the court suggested

BEST COPY AVAILABLE

that if Hopkins wanted a "quick track rubber stamp" procedure, it should amend its faculty handbook to provide for such a procedure.

Initial Appointment

Moustafa Awada sued the University of Cincinnati alleging promissory estoppel and breach of contract. Awada was offered a postdoctorate position within the particle theory physics group at the University of Cincinnati. Awada, however, was not interested in a postdoctorate fellowship but desired a full-time position.

In spring 1991, Fred Mansouri of the particle theory physics group wrote Awada and stated there was a potential retirement in the department. He said once the position opened, he and the other members of the group would recommend Awada for the position if he would accept a postdoctorate fellowship beginning in September 1991.

Awada delivered a paper in April 1991 and again was assured by several colleagues in the group that they would recommend him for the vacancy and that if he would accept a postdoctorate fellowship, it would improve his chance for the position. In response to these statements, Awada accepted a position as postdoctorate research assistant at the University of Cincinnati in September 1991. A position did open when the professor expected to retire, retired. However, the position was frozen due to financial constraints. Awada was informed that he should seek another position. He attempted to find another position but was unsuccessful and finished out his postdoctorate research.

In the fall of 1993, another position opened in the group. It was, however, in a field for which Awada allegedly was not qualified. He did apply for the position but, based on his qualifications, he did not receive the position and another professor was hired. At that point, Awada filed a lawsuit. (*Awada* v. *University of Cincinnati*, 1997)

The court focused on Awada's assertion of the doctrine of promissory estoppel and whether the university should have reasonably expected the representations to be relied on by Awada and if so, whether the failure of the promises was to his detriment. The court cited the following four factors governing the doctrine of promissory estoppel: (1) whether there was a promise to Awada; (2) whether Awada relied on the promise; (3) whether the reliance caused a detriment to Awada; and (4) whether the reliance was justifiable. The court ruled that the first three elements were met and therefore focused on the fourth element of whether the reliance was justifiable.

The court concluded that it was not reasonable for Awada to rely on the promises. First, the court noted that Awada should have known the professors in the particle theory group did not have the authority to promise a recommendation for a faculty position without considering other applicants.

A person with plaintiff's amount of postdoctorate experience should have knowledge regarding the hiring practices of universities and colleges for faculty positions. Due to this acquired knowledge, a reasonable person, comparable to that of the plaintiff, should have known that the particle theory group did not have authority to promise a recommendation for a faculty position.

Second, the court ruled that Awada should not have reasonably relied on an oral promise but he should have required the agreements be in writing. The facts indicated that Awada had asked for a written statement but Professor Mansouri refused to comply with the request. "The court finds that, upon a refusal by a promisor to place a promise in writing, a reasonable person should have been put on notice that such a promise was not reliable."

Finally, the court noted that it was unreasonable to rely on a promise where it was based on "an uncertain contingency," such as a retirement of a professor in the department which had yet to occur. The court concluded:

A reasonable person would have known that there was a chance of the promise not being fulfilled. Therefore, the court finds that a reasonable person would not have relied on the promise, since it was based on an uncertain contingency.

The court, in rejecting Awada's claim of promissory estoppel, also rejected his breach of contract claim. The court noted that if Awada had any claim to a position, it was to the one held by the retired faculty member and not to the one subsequently developed and unrelated to the retirement.

Presidential Policy Making

In the complex and loosely structured higher education organization, it is difficult to determine who has authority to do what and who has authority to adopt policies concerning faculty and their employment conditions.

Einar Holm, a tenured faculty member at Ithaca College, sued the college after his termination on the basis of his violation of the college's sexual harassment policy. (*Holm* v. *Ithaca College*, 1998) He argued that the president lacked authority to institute a policy on sexual harassment.

Holm claimed that the sexual harassment policy was not an official policy of the college since it was not approved by the board of trustees. The college had a faculty handbook which contained a variety of policies. The board of trustees had approved an equal opportunity statement in 1984, however, a sexual harassment policy was later promulgated by the president without specific endorsement by the trustees. The faculty handbook provided that the faculty should be governed by the handbook as approved by the board of trustees. The board of trustees approved the entire handbook in 1993, sometime after the president had instituted the sexual harassment statement.

The record shows that Holm was fully aware of the sexual harassment statement since he had been warned of its applicability to him by the president. Holm was later charged with sexual harassment due to complaints from several female students. A corrective plan was instituted. Subsequently, however, Holm's classroom language and conduct continued to violate the policy and after several meetings, the provost recommended dismissal which was accepted by the president.

BEST COPY AVAILABLE

One of Holm's claims was that the president did not have authority to promulgate the sexual harassment policy. After reviewing the development of the handbook policies and the board of trustees approval of those policies, the court concluded that the president acted within his delegated powers. Accordingly, it upheld the approval of the sexual harassment policy and its application to Holm.

Business Transactions

Providence College was sued by a creditor trying to enforce a loan guarantee that the college made for contractors working on a major asbestos abatement project for the college. Since the college was to pay the asbestos contractors, who were in some financial difficulty, the bank asked for and obtained from the college a loan guarantee.

The guarantee was signed by the college's vice president for business affairs. The college and the contractors were eventually sued by the bank that held the guarantee. (*FDIC* v. *Providence College*, 1997)

The college defended the action arguing that its vice president for business affairs, Joseph Byron, did not possess actual or apparent authority to guarantee loans on behalf of the college. The trial court concluded that Byron did have the authority and entered a judgment against the college in the amount of $621,000.

On appeal, there was agreement that Byron lacked actual authority to sign the guarantee. The appellate court like the trial court, focused on the question of apparent authority. The court examined whether there was a factual showing that the words or conduct of Providence communicated to the bank gave rise to the appearance and belief that Byron possessed authority to enter into the transaction. The court ruled that the lender could in fact rely on Byron based on his title and position at the college. The court then examined the question whether the reliance was reasonable.

If the transaction is one that colleges normally do not enter into, then the court stated there is a responsibility on the person making the reliance to determine whether Byron had actual or apparent authority to make the guarantee.

Concluding that the loan guarantee signed by Byron was a novel and extraordinary transaction, the court ruled that the bank's reliance on Byron's apparent authority was not reasonable. The bank had adequate basis for inquiring whether Byron actually possessed authority to sign the guarantee and if they had inquired, they would have found that he had no such authority. The court, therefore, ruled for Providence College and reversed the lower court judgment.

Academic Requirements

Residency Requirement

Errol Blank, a student at Brooklyn College, had attended the college for about three years and was seeking a B.A. degree. The college had adopted a professional option plan which provided that a student could receive a B.A. degree if the student enrolled for three years at Brooklyn College, completed the first year of law school, and successfully completed other college requirements.

Errol Blank discussed his plan to enter law school and the professional option plan with the prelaw advisor at Brooklyn College who informed Blank that he was eligible for the plan. Blank planned to enter Syracuse Law School in the fall of 1963. Pursuant to that three-year option, he consulted with the counseling and guidance office to make sure he met the requirements of the plan. Blank needed to take a number of psychology courses in order to complete his undergraduate major. He talked with the head of the department of psychology to inquire whether he could take several of these required courses at another institution.

According to the court, the chair of the department advised Blank that the courses would have to be taken at Brooklyn College. Blank took several of the courses in the summer of 1963 and passed them. Blank then talked again with the head of the department who assured Blank that he could take the two remaining courses without attending classes if the course professors agreed to this procedure.

Blank obtained the approval of both professors who taught the two required psychology courses. Blank registered for the courses, studied the reading material, and took the examinations. He passed the courses and the credits for each course were noted on his official record.

Upon the completion of two years of Syracuse Law School, in May 1965, Brooklyn College was notified of his law school work. Blank was then notified about commencement and was given information on where to obtain his cap and gown.

Assuming he would graduate, Blank applied for a position with the City of New York which required candidates to hold a college degree. On June 9, 1965, with cap and gown, Blank attended the graduation at Brooklyn College along with his parents, grandmother, brother, and friends. Blank scanned the graduation list and his name was not there. Later he learned that he had been denied his B.A. degree because he had not taken two psychology classes "in attendance."

Blank sued Brooklyn College seeking his degree. (*Blank* v. *Board of Higher Education*, 1966) The college denied that it had promised Blank that he could receive credit toward these two courses and the professors denied "ever discussing degree requirements with" Blank. The chair of the department also denied discussing the requirements with Blank. The college also argued that even if such conversations occurred, college policy required that the advanced courses in a major must be completed in residence at the college.

The court rejected the college's argument and found for Blank. First, the court stated that the college requirements regarding residency under this professional plan were not at all clear. In fact, the court noted that there were several sections in the bulletin that suggested students could take these courses without being in residence. Moreover, the court found that Blank was advised that he could take these

courses while a nonresident and that whatever policies were in existence, they were not known to the head of the psychology department nor to the two professors.

The court found:

The Chairman of the Department of Psychology and the two professors who taught the courses in question surely had authority to determine, as they did, the appropriate manner in which the courses should be taken by petitioner, within the published regulations. Petitioner acted in obvious reliance upon the counsel and advice of members of the staff of the college Administration to whom he was referred and who were authorized to give him such counsel and advice. They undoubtedly knew or should have known that he was seeking credit toward an B.A. degree while planning to attend, and, later, while attending, Syracuse Law School.

Clearly, the court was influenced by the number of persons in authority from whom Blank had obtained approval for his proposed off campus program. "The Dean of Faculty may not escape the binding effect of the acts of his agents performed within the scope of their apparent authority." Furthermore, Blank had completed all of the college degree requirements in terms of hours and grade point even though he did not, according to the college, complete the residency requirement.

Oral Examination

In a case involving the requirement of an oral examination for a Ph.D. degree in business, Gerard Tanner sued the University of Illinois seeking the award of his degree. (*Tanner* v. *University of Illinois*, 1984) Tanner had completed all of the course work for the doctorate degree and was excused from taking the written comprehensive examination. The dispute concerns the fact that Tanner was unable to pass the required oral examination and his subsequent claim that the faculty had waived the oral examination requirement. During the oral process, Tanner encountered serious difficulties with one of the members of his doctoral committee.

Tanner took the oral examination but failed it on two occasions. Tanner's basic argument was that since he was permitted to leave the campus and was not in residence at the time of the oral examination and since he was permitted to start his thesis, the faculty had waived the oral examination requirement.

The lower court found for the university. The appellate court supported the decision of the trial judge that the faculty did not waive the oral examination requirement. The appellate court ruled that none of the behavior of the faculty caused a waiver or estoppel. "No evidence gave any indication that defendant's faculty mislead plaintiff into relying on the fact that he would not have to complete his preliminary oral examinations." Furthermore, the court was impressed by the fact that Tanner knew of the requirement, had failed the oral examination on two occasions, and actions to help him could not form the basis of a waiver. The court also noted its unwillingness to "intervene in matters concerning awards for academic achievement."

Preventive Planning

Who can obligate the university arises in a variety of contexts. Administrators of institutions clearly appear to have authority to bind the institution in matters related to employment, in recruitment, academic requirements, and business transactions. In order to buffer claims that administrators have such authority, it is important to have specific policies that govern employment and academic requirements. It is difficult to argue that a dean or vice president could waive the requirements for tenure when there is a very specific policy on how tenure is obtained and who approves a tenure award.

Administrators must be alert to making oral assurances and how they respond to questions from potential employees. Persons doing business with outside agencies and vendors should clearly understand the limits of their authority to obligate the institution.

Faculty advisors must be aware of the various policies of the institution and the requirements for graduation. Even though courts are reticent to intrude into academic judgments, if faculty in positions of authority, however, waive requirements, the institution may be bound by their actions.

Administrators should periodically review sources of authority to ensure that they provide authorization for actions undertaken by them and if not, why not. Those sources of authority include charters, bylaws, internal policies, in some cases state statutes or regulations, and the general practice of the college.

—*Kent M. Weeks*

Selected Bibliography

Cases

Awada v. *University of Cincinnati*, 680 N.E.2d 258 (Ohio. Ct. of Claims 1997).

Blank v. *Board of Higher Education*, 273 N.Y.S.2d 796 (1966).

FDIC v. *Providence College*, 115 F.3d 136 (2nd Cir. 1997).

Healy v. *Larsson*, 323 N.Y.S.2d 625, *affirmed* 348 N.Y.S.2d 471 (1973), *affirmed*, 360 N.Y.S.2d 419 (1974).

Holm v. *Ithaca College*, 669 N.Y.S.2d 483 (1998).

Johns Hopkins University v. *Ritter*, 689 A.2d 91 (Md. App. 1996).

Marriott v. *Cole* v. *Morgan State University*, 694 A.2d 123 (Md. App. 1997).

Romer v. *Hobart & William Smith Colleges*, 842 F.Supp. 703 (W.D.N.Y. 1994).

Tanner v. *Board of Trustees University of Illinois*, 459 N.E.2d 324 (1984).

Articles and Books

Kaplan, W., and Lee, B., *The Law of Higher Education*, Jossey-Bass, 1995.

Weeks, K.M., "Consumerism and the University: A New Look at Progsam Delivering Graduation Requirements," 14 *Lex Collegii* (Summer 1990).

Weeks, K. M., *Faculty Employment Policies: A Forms Manual for College Decision Makers*, College Legal Information, Inc., 1997.

Topic Index

Spring 1978 - Spring 1998

Academic Advising
Academic Advising and the Duty to Advise*, Vol. 12, No. 3, p. 1 (Winter 1989)
Academic Freedom
Bakke and Academic Freedom (Interrogatories) Vol. 2, No. 2, p. 8 (Fall 1978)
Academic Freedom: Its Protections and Limitations*, Vol. 13, No. 1, p. 1 (Summer 1989)
Professors and Classroom Controversy*, Vol. 16, No. 1, p. 1 (Summer 1992)
Admissions
Admission Programs and Diversity (Interrogatories) Vol. 19, No. 4, p. 7 (Spring 1996).
Affirmative Action
Affirmative Action (Interrogatories) Vol. 11, No. 3, p. 6 (Winter 1988)
Voluntary Affirmative Action (Interrogatories) Vol. 11, No. 4, p. 6 (Spring 1988)
Affirmative Action (Interrogatories) Vol. 12, No. 3, p. 7 (Winter 1989)
Age Discrimination
Age Discrimination*, Vol. 4, No. 4, p. 4 (Spring 1981)
Age Discrimination in Employment in the '80s: Preventive Planning for Colleges and Universities*, Vol. 5, No. 1, p. 4 (Summer 1981)
Age Discrimination in Employment and the 1986 Amendments*, Vol. 10, No. 3, p. 1 (Winter 1987)
The Age Discrimination Act of 1975 (Interrogatories) Vol. 11, No. 2, p. 5(Fall 1987)
Age Discrimination: Promotions and Faculty Employment*, Vol. 15, No. 2, p. 1 (Fall 1991)
AIDS
AIDS and the Campus*, Vol. 10, No. 2, p. 1 (Fall 1986)
Alcohol
Consumption of Alcohol: Supervision on Campus*, Vol. 6, No. 2, p. 4 (Fall 1982)
Alcohol and the Campus: Is a College or a College Organization a Social Host?*, Vol. 9, No. 1, p. 1 (Summer 1985)
Fraternities and Alcohol (Interrogatories) Vol. 13, No. 4, p. 6 (Spring 1990)
Antitrust
Antitrust (Interrogatories) Vol. 16, No. 2, p. 6 (Fall 1992)
Antitrust and Financial Aid (Interrogatories) Vol. 17, No.2, p. 6 (Fall 1993)
M.I.T. Antitrust Case Settled (Interrogatories) Vol. 17, No. 3, p. 1 (Winter 1994)
Asbestos
The Asbestos Hazard*, Vol. 7, No. 1, p. 4 (Summer 1983)
Buckley Amendment
The Buckley Amendment (Interrogatories) Vol. 4, No. 2, p. 5 (Fall 1980)
Parents' Rights Under the Family Educational Rights and Privacy Act of 1974*, Vol. 8, No. 4, p. 1 (Spring 1985)
Access to Campus Crime Reports (Interrogatories) Vol. 14, No. 4, p. 7 (Spring 1991)
The Buckley Amendment and Current Issues*, Vol. 16, No. 4, p. 1 (Spring 1993)
Disclosure of Student Records (Interrogatories) Vol. 20, No. 3, p. 7 (Winter 1997).
Campus Security
Risk Management: Security on the Campus*, Vol. 3, No. 3, p. 5 (Winter 1980)
Campus Security (Interrogatories) Vol. 7, No. 2, p. 6 (Fall 1983)
Compliance With the Campus Security Act and Liability for On-Campus Crime*, Vol. 17, No. 4, p. 1 (Spring 1994)
Catalogs and Contracts
The Student University Contract: Change of Requirements,* Vol. 13, No. 2, p. 1 (Fall 1989)
The College Catalogue and Contractual Commitments*, Vol. 19, No. 4, p.1 (Spring 1996).
Collective Bargaining
Collective Bargaining: New Ground is Broken at *Yeshiva**, Vol. 2, No. 2, p. 1 (Fall 1978)
Collective Bargaining: After *Yeshiva*, What*? Vol. 4, No. 2, p. 1 (Fall 1980)
The Current Terrain: Collective Bargaining After *Yeshiva**, Vol. 7, No. 2, p. 1 (Fall 1983)
College Rules
College Rules and Liability*, Vol. 11, No. 4, p. 1 (Spring 1988)
Collegiality
Collegiality and the Quarrelsome Professor*, Vol. 20., No. 1, p. 1 (Summer 1996)
Comparable Worth
Comparable Worth: A Doctrine in Search of Application*, Vol. 8, No. 2, p. 1 (Fall 1984)
Consensual Sexual Relationships
Consensual Sexual Relationships and Policy Development*, Vol. 19, No. 1, p. 1 (Summer 1995)
Copyright
Fair Use: Copy Making and the New Copyright Law*, Vol. 1, No. 1, p. 3 (Spring 1978)
Copyright Violations and Fair Use*, Vol. 6, No. 4, p. 6 (Spring 1983)
Cyberspace
Cyberspace and the Campus*, Vol. 21, No. 2, p. 1 (Fall 1997)
Defamation
Defamation: Grounds for Challenging Evaluation*, Vol. 3, No. 1, p. 4 (Summer 1979)
Defamation: The College Tenure Committee and Other Sanctions*, Vol. 9, No. 2, p. 1 (Fall 1985)
Faculty Evaluation and Defamation*, Vol. 13, No. 3, p. 1 (Winter 1990)
Degree Revocation
Revocation of a Degree (Interrogatories) Vol. 8, No. 4, p. 6 (Spring 1985)
Revocation of a Degree (Interrogatories) Vol. 10, No. 2, p. 6 (Fall 1986)
Revocation of a Degree (Interrogatories) Vol. 10, No. 3, p. 1 (Winter 1987)
Disability
Handicapped Students and Reasonable Accommodation*, Vol. 5, No. 1, p. 1 (Summer 1981)
Emotionally and Psychologically Disturbed Students and Withdrawal Policies*, Vol. 6, No. 4, p. 1 (Spring 1983)
Handicapped Students and Admissions Policies*, Vol. 12, No. 4, p. 1 (Spring 1989)
Americans With Disabilities Act of 1990 (Interrogatories) Vol. 14, No. 2, p. 7 (Fall 1990)
Disabled Students in the Academic Setting: Meeting the Legislative Mandates*, Vol. 17, No. 1, p. 1 (Summer 1993)
Admission of Students With Disabilities (Interrogatories) Vol. 18, No. 4, p. 7 (Spring 1995)
Disabled Students in the Nonacademic Setting*, Vol. 20, No. 3, p. 1 (Winter 1997).
Academic Accommodations and Disabled Students*, Vol. 20, No. 4, p. 1 (Spring 1997)
Academic Accommodation and Degree Requirements (Interrogatories) Vol. 21, No. 2, p. 7 (Fall 1997)
Discrimination General
Civil Rights Act of 1991 (Interrogatories) Vol. 15, No. 3, p. 6 (Winter 1992)
Dismissal for Cause
Dismissal for Cause*, Vol. 2, No. 3, p. 1 (Winter 1979)
Dismissal for Cause and Lesser Sanctions*, Vol. 7, No. 3, p. 1 (Winter 1984)
Tenure, Dismissal, and Other Sanctions*, Vol. 15, No. 3, p. 1 (Winter 1992)

Divestment
South African Divestment (Interrogatories) Vol. 9, No. 4, p. 6 (Spring 1986)
Drugs
Drug-Free Workplace Act (Interrogatories) Vol. 12, No. 4, p. 6 (Spring 1989)
Equal Pay
Equal Pay: The Emerging Terrain*, Vol. 8, No. 1, p. 1 (Summer 1984)
Extracurricular Activities
Extracurricular Activities and Institutional Liability*, Vol. 15, No. 1, p. 1 (Summer 1991)
Faculty Complaint Procedures
Faculty Complaint Procedures: An Aspect of Preventive Management*, Vol.5, No. 3, p. 1 (Winter 1982)
Faculty Handbooks
The Faculty Handbook and Contractual Claims*, Vol. 19, No. 2, p.1 (Fall 1995)
Financial Exigency
Coming to Grips with Financial Exigency*, Vol. 2, No. 1, p. 1 (Summer 1978)
Financial Exigency Revisited*, Vol. 3, No. 2, p. 1 (Fall 1979)
Termination of Tenured Faculty Members for Fiscal or Program Reasons (Interrogatories) Vol. 5, No. 4, p. 5 (Spring 1982)
Restructuring and Financial Exigency*, Vol. 15, No. 4, p. 1 (Spring 1992)
First Amendment
First Amendment Free Exercise Protections*, Vol. 6, No. 1, p. 1 (Summer 1982)
First Amendment Protections and Denial of Recognition to Student Gay Rights Groups (Interrogatories) Vol. 9, No. 3, p. 7 (Winter 1986)
Government Loans
Defaults on Government Facilities Loans (Interrogatories) Vol. 6, No. 2, p. 6 (Fall 1982)
Grading
Grading and the Professor (Interrogatories) Vol. 14, No. 3, p. 6 (Winter 1991)
Grade and Test Challenges*, Vol. 21, No. 1, p. 1 (Summer 1997)
Hate Speech
Hate Speech on the College Campus*, Vol. 14, No. 3, p. 1 (Winter 1991)
Immigration
Immigration Reform and College Compliance*, Vol. 11, No. 1, p. 1 (Summer 1987)
Legal Audit
Legal Audits (Interrogatories) Vol. 3, No. 2, p. 8 (Fall 1979)
The Legal Audit, Vol. 4, No. 3, p. 1 (Winter 1981)
Litigation Index
Litigation Index, Vol. 19, No. 3, p. 7 (Winter 1996).
Litigation Index, Vol. 21, No. 3, p. 7 (Winter 1998)
Mergers
Creative Options: College Mergers and Institutional Reassessment*, Vol. 11, No. 2, p. 1 (Fall 1987)
Negligent Hiring
Negligent Hiring, Retention, and Referral*, Vol. 20, No. 2, p. 6 (Fall 1996)
Personnel Files and Decisions
Judicially Compelled Disclosure of Personnel Actions*, Vol. 5, No. 4, p. 1(Spring 1982)
Academic Personnel Files and Decisions (Interrogatories) Vol. 5, No. 3, p. 5 (Winter 1982)
Peer Review in Personnel Decisions: Disclosure and Confidentiality*, Vol. 9, No. 4, p. 1 (Spring 1986)
Peer Review Materials: What Can Be Obtained?*, Vol. 12, No. 1, p. 1 (Summer 1988)
Confidentiality and Peer Review Materials (Interrogatories) Vol. 13, No. 3, p. 7 (Winter 1990)
Plagiarism
Plagiarism at Princeton: An Academic Judgment or a Disciplinary Procedure*, Vol. 6, No. 3, p. 1 (Winter 1983)
Plagiarism and Negligent Scholarships (Interrogatories) Vol. 18, No. 2, p. 7 (Fall 1994)
Planned Giving
Planned Giving Programs and Major Gifts, Vol. 6, No. 1, p. 5 (Summer 1982)
Professional Ethics
Professional Ethics (Interrogatories) Vol. 15, No. 2, p. 7 (Fall 1991)
Race Discrimination
Racial Discrimination in Faculty Tenure and Promotion Decisions*, Vol. 18, No. 2, p. 1 (Fall 1994)
Release of Liability
Releases of Liability (Interrogatories) Vol. 7, No. 4, p. 6 (Spring 1984)
Protecting the College: Releases of Liability (Interrogatories) Vol. 12, No. 2, p. 6 (Fall 1988)
Residence Halls
Commercialization of Residence Halls (Interrogatories) Vol. 13, No. 2, p. 6 (Fall 1989)
Retirement Planning
Retirement Planning and Retirement Incentive Programs*, Vol. 16, No. 2, p. 1 (Fall 1992)
Scholarships
Minority Scholarships (Interrogatories) Vol. 15, No. 4, p. 6 (Spring 1992)
Race-Based Scholarships (Interrogatories) Vol. 17, No. 4, p. 7 (Spring 1994)
Race-Based Scholarships Revisited (Interrogatories) Vol. 18, No. 3, p. 7 (Winter 1995)
Scientific Misconduct
Academic Fraud and Scientific Misconduct*, Vol. 18, No. 1, p. 1 (Summer 1994)
Self Regulation
Self-Regulation: Avoiding External Controls Through Voluntary Action*, Vol. 4, No. 1, p. 4 (Summer 1980)
Sex Discrimination
Faculty Appointments: Fair Employment Practices, Sex Discrimination, and Title VII*, Vol. 2, No. 2, p. 4 (Fall 1978)
Sex Discrimination in Employment: Judicial Intervention or Abrogation?*, Vol. 3, No. 3, p. 1 (Winter 1980)
Female Faculty Members and Tenure Decisions: Sex Discrimination in Employment*, Vol. 8, No. 3, p. 1 (Winter 1985)
Statistical Data, Tenure and Sex Discrimination Litigation, Vol. 8, No. 3, p. 8 (Winter 1985)
Sex Discrimination: Promotion and Tenure Decisions*, Vol. 14, No. 4, p. 1 (Spring 1991)
Sexual Harassment
Sexual Harassment and Preventive Planning*, Vol. 5, No. 2, p. 1 (Fall 1981)
Sexual Harassment and College Policy*, Vol. 10, No. 4, p. 1 (Spring 1987)
Sexual Harassment: An Expanding Claim*, Vol. 17, No. 3, p. 1 (Winter 1994)
Class Lectures Challenged (Interrogatories) Vol. 19, No. 2, p. 7 (Fall 1995)
Peer Sexual Harassment (Interrogatories) Vol. 20, No. 2, p. 6 (Fall 1996)
Sexual Harassment of Students (Interrogatories) Vol. 20, No. 4, p. 7 (Spring 1997)
Peer Sexual Harassment: Is the College Liable?*, Vol. 21, No. 4, p. 1 (Spring 1998)
Sports
Athletic-Related Injuries and Liability*, Vol. 10, No. 1, p. 1 (Summer 1986)
College Liability and Athletes' Behavior (Interrogatories) Vol. 10, No. 3, p. 6 (Winter 1987)
Gender Equity and Athletics*, Vol. 17, No. 2, p. 1 (Fall 1993)
State Action
State Action: Constitutional Restrictions - State and Independent Institutions*, Vol. 2, No. 3, p. 4 (Winter 1979)
The Constitution and Independent Colleges*, Vol. 12, No. 2, p. 1 (Fall 1988)
State Action and Independent Institutions (Interrogatories) Vol. 21, No. 4, p. 7 (Spring 1998)
Student Academic Proceedings
Academic Dismissals and Breach of Contract*, Vol. 1, No. 1, p. 2 (Spring 1978)
Horowitz and Academic Dismissal (Interrogatories) Vol. 2, No. 1, p. 5 (Summer 1978)
Student Academic Proceedings and Institutional Discretion*, Vol. 5, No. 2, p. 6 (Fall 1981)
Student Challenges to Academic Dismissals*, Vol. 16, No. 3, p. 1 (Winter 1993)
Student Activities
Supervision of Off-Campus Events*, Vol. 4, No. 3, p. 5 (Winter 1981)
Student Aid Program
Student Aid Program Upheld: The Last Word?, Vol. 1, No. 1, p. 4 (Spring 1978)

(continued on page 8)

BEST COPY AVAILABLE

(continued from page 7)

Student Bankruptcy
Student Bankruptcy and Educational Loans*, Vol. 7, No. 4, p. 1 (Spring 1984)
Students as Consumers
Students as Consumers: Taking on the University*, Vol. 2, No. 4, p. 1 (Spring 1979)
Students as Consumers-Part II: Negligence and Misrepresentation*, Vol. 3, No. 1, p. 1 (Summer 1979)
Consumerism and the University: A New Look at Program Delivery and Graduation Requirements*, Vol. 14, No. 1, p. 1 (Summer 1990)
Consumerism: Admissions, Athletes, and Teaching*, Vol. 14, No. 2, p. 1 (Fall 1990)
Educational Malpractice (Interrogatories) Vol. 16, No. 4, p. 6 (Spring 1993)
Student Disciplinary Proceedings
Student Disciplinary Proceedings and Fair Procedures*, Vol. 4, No. 4, p. 1 (Spring 1981)
Disciplinary Dismissals and Suspension of Students and Institutional Policies*, Vol. 9, No. 3, p. 1 (Winter 1986)
Student Discipline and Off-Campus Misconduct*, Vol. 13, No. 4, p. 1 (Spring 1990)
Student Disciplinary Proceedings: Hazing, Sex, and Compliance*, Vol. 18, No. 3, p. 1 (Winter 1995)
Student Evaluations
Student Evaluations of Faculty and the Legal Context*, Vol. 11, No. 3, p. 1 (Winter 1988)
Student Handbooks
Student Handbooks: Rights and Responsibilities*, Vol. 6, No. 2, p. 1 (Fall 1982)
Contract Challenges and the Student Handbook*, Vol. 19, No. 3, p. 1 (Winter 1996)
Student Publications
Student Publications: Libel and Potential Institutional Liability*, Vol. 7, No. 1, p. 1 (Summer 1983)
Teachers
Teachers as Role Models*, Vol. 18, No. 4, p. 1 (Spring 1995)
Tenure
Tenure by Default*, Vol. 4, No. 1, p. 1 (Summer 1980)
Tenure: Modifications of Terms and Conditions*, Vol. 7, No. 3, p. 4 (Winter 1984)
Title IX
Title IX and Private Right of Action (Interrogatories) Vol. 3, No.1, p. 7 (Summer 1979)
Discrimination: 'Recipient Status' and Covered Programs*, Vol. 6, No. 3, p. 4 (Winter 1983)
Grove City and Title IX Compliance (Interrogatories) Vol. 8, No. 2, p. 6 (Fall 1984)
Title IX and Women's Sports (Interrogatories) Vol. 16, No. 3, p. 6 (Winter 1993)
Trustees
Trustee Responsibility, Vol. 2, No. 1, p. 4 (Summer 1978)
Trustee Responsibility: Conflict of Interest, Vol.2, No. 4, p. 6 (Spring 1979)
Wilson College: Trustee Responsibility, Vol. 3, No. 2, p. 5 (Fall 1979)
Trustee Removal (Interrogatories) Vol. 3, No. 4, p. 7 (Spring 1980)
Mismanagement and Self-Dealing: Fiduciary Duties of College and University Trustees*, Vol. 21, No. 3, p. 1 (Winter 1998)
Unfair Competition
Unfair Competition (Interrogatories) Vol. 9, No. 2, p. 6 (Fall 1985)
Unrelated Business Income
Current Problems and Planning in Unrelated Business Income*, Vol. 3, No. 4, p. 1 (Spring 1980)
Wage and Price Guidelines
Wage and Price Guidelines (Interrogatories) Vol. 2, No. 3, p. 7 (Winter 1979)
*Contains Selected Bibliography

Back issues of each number of *Lex Collegii* are available for $8.00 each. Send payment to College Legal Information, Inc., P.O. Box 150541, Nashville, Tennessee 37215.

IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL PERSON SHOULD BE SOUGHT.

General Board of Higher Education and Ministry
The United Methodist Church
P.O. Box 871
Nashville, Tennessee 37202-0871

Lex Collegii ISSN 0749-9078 is published quarterly, spring, summer, fall, and winter by College Legal Information, Inc. **Lex Collegii** is a registered trademark of College Legal Information, Inc. **Lex Collegii** is provided free to United Methodist-related college and university personnel: for others there is a subscription rate. All subscription inquiries and general correspondence should be addressed to:

Lex Collegii
College Legal Information, Inc.
P.O. Box 150541
Nashville, Tennessee 37215

Copyright © 1998 by the General Board of Higher Education and Ministry, The United Methodist Church, Nashville, Tennessee, 37202.

Vol. 22, No. 2 Fall, 1998

Lex Collegii

A Legal Newsletter For Independent Higher Education

Contents

The Fiduciary Obligations of Faculty and Administrators 1
The CLI Higher Education Litigation Index 7

Editorial Board

Kent M. Weeks
Editor and attorney

Paul Hardin
Attorney and former chancellor, University of North Carolina, Chapel Hill

Phil Moots
Attorney

Linda Lorimer
Attorney and Secretary, Yale University

Vic Hahn
Attorney and vice president, Capital University

Lex Collegii
College Legal Information, Inc.
P.O. Box 150541
Nashville, Tennessee 37215

The Fiduciary Obligations of Faculty and Administrators

Professors and deans have a responsibility to their students and college. Like the supervisor or key employees of a business, administrators and teachers are charged with the responsibility for ensuring the work of the college, namely the education of its students, is completed successfully. The recent rise in litigation against institutions—due largely to contested employment decisions including negligent or sexually harassing activity of employees—raises issues regarding the legal obligations key personnel have to the college and its consumers.

This article addresses obligations that may arise from the courts' willingness to characterize professors and administrators as fiduciaries of the college. Two different relationships will be considered: (1) the legal obligations stemming from the relationship between faculty and students; and (2) the legal obligations that derive from administrators' relationship to the independent college.

Fiduciary Relationships

Fiduciary is a legal term that describes a special relationship of trust and care between parties. It typically occurs when a dependent entrusts valuable information or property into the care of a dominant party. Numerous situations fit this description and courts often analogize from well accepted fiduciary relationships: attorney-client; principal-agent; physician-patient; and parent-child. If such a relationship exists, the dominant party, the fiduciary, has an equitable duty to act with care, candor, and in the best interests of the beneficiary. Judge Benjamin Cardozo described the fiduciary's obligation as "not honesty alone, but the punctilio of the honor most sensitive."

Professional Ethics and Student-Professor Relationships

Most professors would admit that the student-professor relationship is a kind of fiduciary, or quasi-fiduciary relationship. It is a special arrangement of trust and

BEST COPY AVAILABLE

confidence between a dependent and dominant party.

The American Association of University Professor's (AAUP) statement of ethics, although not using the term fiduciary, recognizes the special obligations a professor has toward students. The statement describes the relationship as a confidential one in which the professor serves as an "intellectual guide and counselor." The professor is required to avoid exploitation of or harm to students. The Association of American Law Schools has described the law professor's obligations to include treating students with civility and respect, and to nurture and protect the student's intellectual freedom.

The professor is required to avoid exploitation of or harm to students.

Despite urging by scholars, no court has held that a professor is a fiduciary to their students. Courts are likely concerned about increasing legal liability of educational institutions and creating divided loyalties for the professor. Indeed such a holding would suggest the professor is a fiduciary both for the school and the student. Nevertheless, for the independent college seeking to avoid liability, it is probably useful to consider the professor-student relationship as a fiduciary one. Professors should always act in the best interests of their students and prevent the appearance of favoritism. The professor should protect students' confidences and not use confidential information to exploit the student or provide advantage to the professor.

The Faculty Advisor

Although courts have been reluctant to classify the student-faculty relationship as fiduciary, a few cases have affirmed that it may be proper to require loyalty, care, and candor from the student's academic advisor.

Marina Andre and Peter Broome enrolled in "CS 502 Fundamental Pascal Planning," described in the Pace University's catalog as a "concentrated orientation course." They wanted a basic computer programming course requiring few math skills and chose this course because their advisor, Dr. Narayan Murthy, chairman of the department of computer science, assured them only rudimentary math skills were necessary. The cost for the four-hour credit course was $1,655.

The class became a nightmare for Andre and Broome. Carroll Zahn, the professor, assigned a condensed Pascal textbook geared to computer science and engineering majors. Andre and Broome were required to attempt homework problems well above their capabilities and expectations. Andre and Broome informed Zahn of their and other students' frustrations. They contacted Murthy, noting the problems they were having with the Pascal course, and requested a meeting. Despite the urgency of the request, Murthy did not agree to meet with Andre and Broome for about three weeks.

When the Pascal class failed to improve, Andre and Broome withdrew and filed a formal complaint with the dean of the computer school. They demanded a full refund for tuition and books. Meetings ensued with the dean and Murthy, but no resolution could be agreed upon. The dean and Murthy supported the tenured professor and defended his competence. The dean refused to refund the tuition although a tuition credit for a subsequent semester was offered.

Andre and Broome brought suit against the university in small claims court for money damages up to $2,000. (*Andre v. Pace University*, 1994) The complaint alleged numerous causes of action including breach of contract, breach of fiduciary duty, and educational malpractice. The court found that a fiduciary relationship existed between the college and student, and the advisor and student.

The fiduciary relationship imposed obligations on the advisor which had not been fulfilled. Specifically, the court explained that Andre and Broome trusted Murthy as their advisor, relying on his judgment of the Pascal course. Murthy had both the power and obligation to address the students' concern with the course. Instead, he failed to act and failed to fulfill his fiduciary duties. In short, the court held that Murthy did not uphold his duty of care to properly advise Andre and Broome about different courses or respond to complaints that they had with the course. Because the advisor had breached his duty, the "university was ultimately responsible for the damages flowing from that breach."

The New York Supreme Court (the trial court of New York) reversed the decision on appeal, holding that the breach of fiduciary duty claim "constituted mere re-formulations of an educational malpractice claim." The educational malpractice claim, furthermore, had previously been rejected in New York on public policy grounds.

The court determined that an assessment of Andre and Broome's claim would require a review of the methodology of the professor and his selection of the Pascal textbook. The court determined that the lower court had "improperly engaged in judicial evaluation of a course of instruction," which was the "proper domain of educators and educational institutions entrusted to the task," and not for the courts. Since the claim involved an action for educational malpractice, a claim not recognized in New York, the court rejected the fiduciary duty argument.

Although not involving an independent college, at least one other decision has acknowledged that a fiduciary duty might arise from an advisor-student relationship. In *Shapiro v. Butterfield* (1996), Jean Shapiro, a graduate student enrolled

in Washington University's George Warren Brown School of Social Work, began a psychotherapy practicum for school credit at the Women's Self-Help Center. Shapiro continued to volunteer for several months after the program ended. Near the end of this period, the Self-Help Center informed her that she must transfer her patients to other counselors. She transferred all of her patients but one, a patient that she thought was suicidal. At the patient's request, Shapiro continued to provide counseling.

The supervisor of the Self-Help Center thereafter filed a complaint with the school's dean which claimed Shapiro had acted unethically. Shapiro then met with her college advisor, William Butterfield, and discussed the situation. After this meeting, Butterfield allegedly referred the complaint to the university's administration. Although the university refused to act because the complaint involved volunteer activities by Shapiro, the National Association of Social Workers (NASW) censured Shapiro. Afterwards, Shapiro filed a lawsuit against her advisor, Butterfield, and the NASW, alleging breach of fiduciary duty and breach of contract.

Shapiro's complaint against Butterfield was that he breached the duty of loyalty by referring the complaint to the administration and breached the duty of care by failing to advise Shapiro of a way to resolve the problem. The court disagreed with the complaint but suggested there might be a claim for breach of fiduciary duty if there were more facts supporting such a relationship. The court suggested that these facts must show: (1) one party was subservient to the dominant will and mind of the other; (2) things of value were managed or possessed by the dominant party; (3) a surrender of independence to the subservient party occurred; (4) the dominant party manipulated the subservient one; and (5) that the subservient placed trust and confidence in the dominant party.

The court, although not refusing to find a fiduciary relationship, suggested Shapiro must prove its existence. Furthermore, such proof must be more than mere conclusory allegations, and it must establish a trust relationship analogous to the corporate or trust fiduciary setting.

Sexual harassment of students by college faculty further undergirds the notion that faculty have a relationship of trust with students. In *Korf* v. *Ball State University* (1984), William Korf, a tenured history professor was dismissed by Ball State after male students informed the university that Korf had subjected them to unwarranted sexual advances and offered grades in exchange for sex.

Sexual harassment of students by college faculty further undergirds the notion that faculty have a relationship of trust with students.

In response, Korf sued in federal district court alleging violations of his procedure and the fairness of the proceedings. The federal district court found for the university and the federal court of appeals agreed.

The federal appellate court found that the university policy against student and faculty sexual relationships was reasonably and rationally related to the duty of the university to provide a proper academic environment. The university had made its policies clear to all faculty members and could terminate Korf for violation of that policy as long as it followed its own disciplinary procedures.

Further, the court was quite clear that there is a relationship of trust between faculty and students and it was reflected in the AAUP statement on professional ethics.

The court noted in regard to Korf's defense to the allegations of sexual harassment, such actions "must be judged in the context of the relationship existing between a professor and his students within an academic environment. University professors occupy an important place in our society and have concomitant ethical obligations."

Administrators' Fiduciary Obligations

Courts have generally demanded a higher degree of loyalty and care from key institutional administrators such as a president or dean. *Cahn* v. *Antioch University* (1984) provides one example of the fiduciary obligation that applies to these officials.

This case arose out of Antioch University and its Antioch School of Law's efforts to deal with a financial crisis in 1979. At that time, "the payroll of the entire university, including that of the school of law, went unpaid," and the university could not meet its outstanding debts to creditors. The law school's Board of Governors issued a resolution informing Edgar S. Cahn and Jean C. Cahn, co-deans and managers of the law school, to fulfill all fiduciary obligations, including the proper disposition of all restricted funds.

Instead of filing for bankruptcy, the university imposed a stringent fiscal limitation on university operations. The law school and other units of the university were directed to maintain accounts on a cash basis, and to transfer all cash promptly to the university. The law school's Board of Governors decided not to comply with this directive. Instead, they transferred all funds received from federal grants to banks in the District of Columbia. Apparently the law school planned to take the president's offer that an individual unit could go it alone if it so desired. A few months later, the law school's Board of Governors adopted a resolution stating

BEST COPY AVAILABLE

that it would "do all things necessary to protect the financial viability of the school of law and to insure that it retains the resources and capacity to discharge fully its obligations to students, clients, employees, creditors, and funding sources."

Toward this end, the Cahns sought and were advised by counsel to insulate all assets against any attempt by the university to assume control of them. The Cahns followed counsel's advice, and subsequently "placed all the law school's assets into a trustee's account, leaving the cash available . . . to meet the [law] school's obligations to faculty, staff, and creditors as they [arose]."

Courts have generally demanded a higher degree of loyalty and care from key institutional administrators such as a president or dean.

Within a month of the decision, the university's Board of Trustee's passed a resolution mandating that the law school account for all funds received, on hand or under its control, by transferring them to the central office as soon as practical. The Cahns requested a deferral of the request, pending a meeting of the law school's Board of Governors. The request was denied, and the president of the university informed various banks in the District of Columbia holding university funds that the Cahns no longer had authority to dispose of these funds.

The Cahns filed suit based on authorization of the law school's Board of Governors, namely its decision that the school should insulate itself from the university and protect its assets. The Cahns sought a declaration that the law school was an entity independent and separate from the university, and that it could conduct its fiscal and administrative affairs without interference from the university.

The court rejected the motion. The law school was not independent. Furthermore, the court directed the law school to transfer all funds received in connection with its operations to the university's central business office. The Cahns were fired by the university that same day. In response, the Cahns filed a breach of contract claim against the university alleging unlawful termination. The university countered with the claim that the Cahns had breached fiduciary obligations.

The Cahns lost. First, the court held that they had not proven more than nominal damages in their breach of contract claim. Second, the court found that they had breached their fiduciary duty to the university. The Cahns owed a duty not to the students and clients of the law school, but rather to the university which paid their salaries.

The court explained that the relationship between the deans and provosts of the university is a principal-agent relationship. Thus, the agent is "bound to exercise the utmost good faith, loyalty, and honesty toward his principal or employer." The Cahns had reason to be concerned about the adverse effect the university's bankruptcy might have on the law school, however, they placed their loyalty in the wrong place. The university had hired them; therefore, the fiduciary obligations were owed to the university.

The key breach of this obligation—the breach that caused damages—was the Cahns' hiring of outside counsel, leading to attorneys fees of $8,000. The court, however, rejected the university's claim that damages should include attorney's fees incurred in the subsequent litigation to obtain the school of law's assets. The court found that such fees are only recoverable if the litigation had been brought in bad faith, which was not the case here.

The implications of this decision are quite clear. Administrators with decision-making authority and access to funds for a particular school or program, such as deans of different colleges, or perhaps even department chairs, owe a fiduciary duty to the institution. This duty, moreover, trumps any other fiduciary obligation. Cahn suggests that such fiduciaries can support an action adverse to the university only after consent is given after full disclosure. Loyalty demands such behavior regardless of the impact it might have on the program the fiduciary directly oversees.

Professors' Fiduciary Obligations to the College

Duties of loyalty, candor, and care are also required of professors to the larger institution. Loyalty may demand that the professor, for example, exercise judgment and refrain from extreme verbal attacks on the college in public.

In *Duke v. North Texas State University* (1972), Elizabeth Anne Duke, a teaching assistant at the college, filed suit against the university for violating her First, Fifth, and Fourteenth Amendment rights pertaining to free speech when it withdrew a teaching assistantship following her verbal attack of the university at a student protest rally. These constitutional claims would not apply in the independent college setting since in almost every case, private colleges are not state actors. At the rally, Duke used profane and obscene language in her criticism of the faculty, students, and American society in general.

Duke was notified by the president that she was terminated. She appealed the decision at an administrative hearing before the president's cabinet. The cabinet decided against rehiring Duke because her profane remarks "failed to recognize and appreciate that the public will judge North Texas State University and its teaching faculty by such statements and actions." Furthermore, her actions at the rally

BEST COPY AVAILABLE

demonstrated a lack of the professional integrity required of teaching faculty.

When Duke lost again on administrative appeal, she decided to file suit in district court which upheld her motion for reinstatement. The appellate court reversed, holding that the academic interests of the university—eg., maintaining the integrity of the faculty, and perpetuating public confidence in the academic institution—outweighed her constitutional protections. The court reasoned that as a past and prospective instructor, Duke owed the university a duty of loyalty and civility to refrain from making disrespectful and grossly offensive remarks toward the university. The breach of this duty undermined her claim for constitutional protections.

The *Duke* case certainly provides an unusual fact pattern. The antiwar protest movement on college campuses created a highly antagonistic atmosphere unlike life on current campuses. Duke's vehement statements, therefore, probably fail to provide a proper gauge of the line between constructive criticism and disloyalty. Nevertheless, the case does suggest that a college professor must act with care when making critical public remarks of the administration. Severe criticisms or comments may be best left to institutional faculty or administrative meetings.

Fiduciary Duty and Research/Innovation

The fiduciary relationship between the college and professor may, in some instances, prohibit the faculty member from using an innovation for personal advantage. The issue hinges on who owns an idea—the faculty member or the university. To answer this question, absent a written policy, courts often examine whether the idea developed within the faculty member's employment capacity. That is, whether the faculty member was "hired to invent."

For instance, the litigation in *Speck* v. *North Carolina Dairy Foundation* (1984) developed from a dispute over the ownership of Marvin Speck's and Stanley Gilhand's discovery of new procedures for the preparation and preservation of concentrates of *lactobacillus acidophilus* (a bacteria that eliminates certain undesirable organisms) and a process which allowed the adding of the bacteria to milk without causing the milk to have a sour flavor.

Speck and Gilhand were professors at North Carolina State University. They were hired to teach and research the use of high temperatures for the pasteurization and sterilization of foods. In this capacity, they also researched microorganisms used in food manufacturing. This research led them to the development of pleasant tasting milk containing *lactobacillus acidophilus*.

Faculty members should place their loyalty to the institution and its students before their own self-interests.

Following their discovery, Speck and Gilhand informed the head of the department of food science. Their memorandum explained the innovation was not sufficiently novel to patent the idea, but suggested the possibility of the use of a trademark and licensing of the product through the North Carolina Dairy Foundation. Upon approval of the plan, the foundation and Speck and Gilhand worked together toward producing and marketing the product. At no point during this period did Speck and Gilhand raise the issue of royalty payments as inventors of the product.

Two years later, after successfully finding a company to market and develop the product, Speck and Gilhand first approached the department chair about a royalty payment of 15 percent. Speck and Gilhand claimed that although the product had never been patented—as required by the written patent policy before a royalty payment would be given—the policy should also apply to trademarks. After several refusals to grant this payment, Speck and Gilhand filed suit, alleging that the university breached its fiduciary obligations to the professors by using the secret process to its own advantage.

Although the trial court ruled that the professors owned the invention, the Supreme Court of North Carolina reversed. The court first explained that the university did not stand in a fiduciary relationship towards Speck and Gilhand concerning the process because they never had any rights to it. The professors had developed the process while employed as teachers and researchers of the university, and, while using university equipment and facilities. In other words, the court determined the professors had been "hired to invent" — a controversial holding, with which some scholars disagree.

The court also seemed to state that professors owed a fiduciary duty to the university, and that this duty required all employees to disclose all discoveries to the employer. *Speck* suggests professors who are hired partly to do research have a duty of loyalty to offer any marketable innovations to the employer—i.e., the college or university. The faculty member can only use the product in an individual capacity if the employer consents after full disclosure.

Preventive Planning

It is clear that courts could likely find a fiduciary relationship for administrators and faculty members. These key employees, and the institution, therefore, need to be aware of their obligations. In general, faculty members should place their loyalty to the institution and its students before their own self-interests. This means they should strive to act professionally in public. This professionalism arises not only in a *Duke* setting, but also in

rivalries and antagonism within the faculty itself. As the AAUP ethical statement suggests, "professors [should not] discriminate against or harass colleagues."

Furthermore, administrators, deans, or heads of different departments need to realize that their loyalty is to the larger institution, not the individual unit they may control. All individual decisions should comport with this view. When an administrator finds loyalties divided, full disclosure and consent should be requested from the governing body of the institution before any action is commenced.

Faculty should act with candor toward the institution, disclosing any key innovations that research might uncover. These innovations may or may not belong to the institution. The *Speck* case is controversial and has been criticized by a number of scholars. Nevertheless, it suggests that the professor, as researcher, may be considered a fiduciary whose work-product belongs to the institution.

Professors and academic advisors should fulfill these same obligations to their students and advisees. Although courts have yet to rule that a fiduciary relationship exists, a good argument suggests that the duties of loyalty and care should be imposed. Students are dependent on professors, often placing high levels of trust and confidence in them. Future court decisions may find this dependence to be enough to require higher standards of care. Consequently, the confidences exchanged in the advisor-advisee situation need to be handled carefully.

Advisors need to cautiously consider the advice they give students and ensure that misrepresentations of institutional matters are avoided. When a complaint arises, the duty of care obligates the advisor at least to meet with students and discuss their concerns, and when possible, offer suggestions. Students' complaints about an advisor's failure to meet promptly or to provide assistance in addressing the students' problem can generate controversy and conflict. Inaction by an advisor could serve as a basis in the future for a court to find a breach of the duty of care.

—*Kent M. Weeks*
—*Scott Fielding*

Selected Bibliography

Articles

Chew, P., "Faculty-Generated Inventions: Who Owns the Golden Egg?" 1992 *Wisconsin Law Review* 259 (1992).

Goidman, A., "The University and the Liberty of Its Students,—A Fiduciary Theory," 54 *Kentucky Law Journal* 643 (1966).

Faulkner, R., Note, "Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit,—The Fiduciary Alternative," 40 *Syracuse Law Review* 837 (1989).

Weeks, K., "Mismanagement and Self-Dealing: Fiduciary Duties of College and University Trustees," 21 *Lex Collegii* (Winter, 1998).

Weeks, K., "Consumerism: Admissions, Athletes, and Teaching," 14 *Lex Collegii* (Fall 1990).

Weeks, K., "Collegiality and the Quarrelsome Professor" 20 *Lex Collegii* (Summer 1996).

Cases

Andre v. *Pace University*, 618 N.Y.S.2d 975(1994), reversed, 655 N.Y.S.2d 777 (Sup. Ct. 1996).

Cahn v. *Antioch University*, 482 A.2d 120 (D.C. Ct. App. 1984).

Duke v. *North Texas State University*, 469 F.2d 829 (5th Cir. 1972).

Korf v. *Ball State University*, 726 F.2d 1222 (7th Cir. 1984).

Shapiro v. *Butterfield*, 921 S.W.2d 649 (Miss. Ct. App. 1996).

Speck v. *North Carolina Dairy Foundation*, 319 S.E.2d 139 (N.C. 1984).

The CLI Higher Education Litigation Index

Indices measure many different trends, such as consumer prices, stock prices, and consumer satisfaction. College Legal Information, Inc. has developed the CLI Higher Education Litigation Index to reflect the legal terrain in which colleges operate.

College Legal Information, Inc. introduced the CLI Higher Education Litigation Index in the Winter 1996 issue of *Lex Collegii*. This issue will provide a more detailed analysis of the impact of federal regulation upon the explosion of litigation involving colleges and universities.

Reported Cases: 1965 - 1997

From 1965 to 1997, litigation involving higher education dramatically rose at an average annual increase of 10 percent. Although the number of cases decreased from 1994 to 1995, the upward trend returned in 1996 and 1997, with an increase of over 20 percent in 1996 and an increase of 12 percent in 1997.

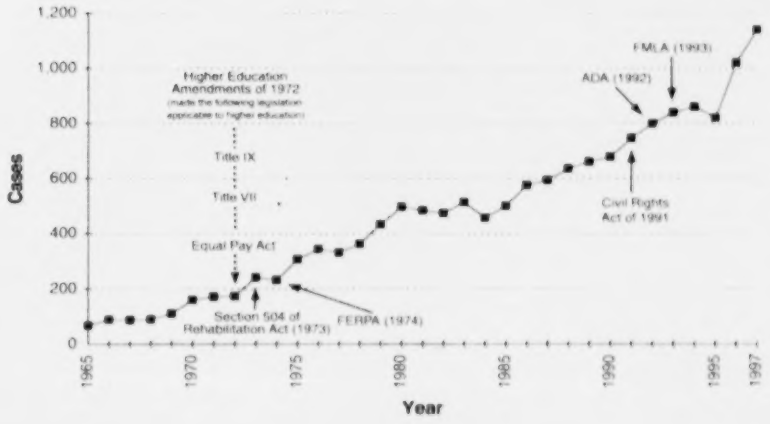
As one considers the information that follows, it is important to keep in mind that the totals for each year include only reported cases; they do not include those cases that were settled or dismissed. Most experts estimate that 90 percent of all lawsuits do not go to trial; and of the estimated 10 percent of cases that are tried, only a fraction are reported. Thus, if the number of lawsuits that were never reported were added to the figures that appear in the charts, the totals would be even more staggering.

The Explosion Analyzed

Although litigation involving higher education clearly is on the rise, what has driven this increase is not altogether clear. As Chart B demonstrates, growth in student enrollment may have had some effect. However, it only partially contributes to the litigation

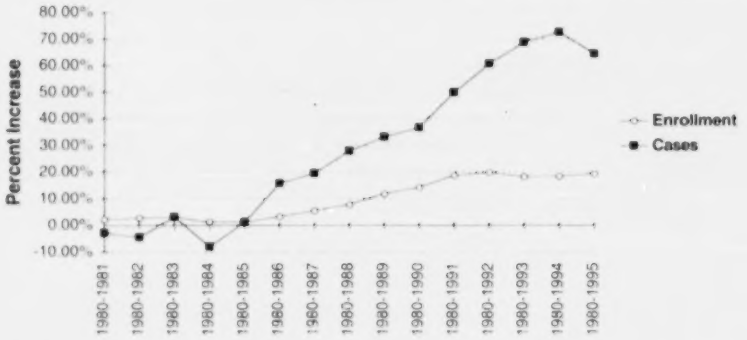
THE CLI HIGHER EDUCATION LITIGATION INDEX™

State and Federal College Litigation: 1965-1997 CHART A



THE CLI HIGHER EDUCATION LITIGATION INDEX™

PERCENT INCREASE IN NUMBER OF CASES AS COMPARED TO PERCENT INCREASE IN ENROLLMENT CHART B



explosion, for the percentage increase in litigation has outpaced dramatically the percentage increase in student enrollment.

The factor that has had perhaps the greatest effect upon the litigation explosion is the increase in federal regulation impacting colleges and universities. For example, beginning in the early 1970s, Congress passed the Higher Education Amendments of 1972, making the Equal Pay Act and Title VII of the Civil Rights Act of 1964 applicable to colleges and universities and establishing Title IX's requirement of gender equity in federally funded programs; the Family Educational Rights and Privacy Act (FERPA); Section 504 of the Rehabilitation Act; the Americans with Disabilities Act (ADA); the Family and Medical Leave Act; and the Civil Rights Act of 1991.

The impact of this legislation may be discerned by reviewing Chart A. For example, from 1965 through 1972, the growth in litigation was tepid, averaging an increase of only 15 reported cases each year. From 1972 until the early 1980s, however, the growth in litigation increased dramatically, averaging an increase of over 25 cases each year. Support for the proposition that the Higher Education Amendments were a driving force behind this increase may be found in the fact that from 1974 through 1985, there were over 625 cases involving Title VII, 105 cases involving Title IX, and 104 cases involving the Equal Pay Act. Of course, many individual cases may have

BEST COPY AVAILABLE

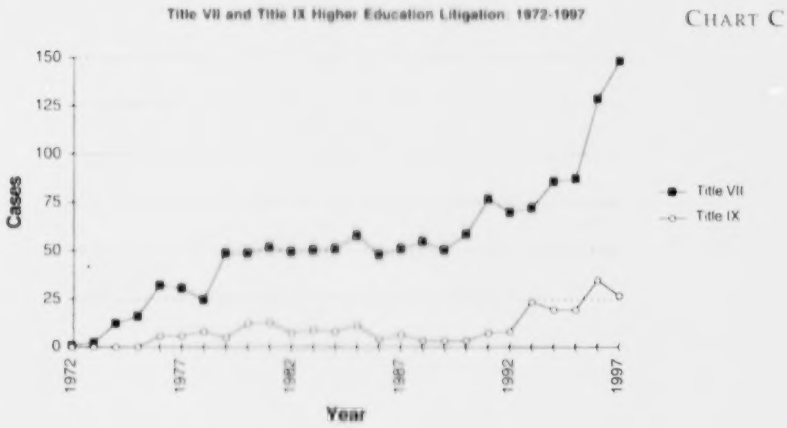
involved two or more of these laws; nevertheless, the figures remain impressive. (It should be noted that the impact of legislation will not be reflected by reported cases until at least a few years after the legislation's effective date, considering the length of time required for a case to proceed through the judicial system.)

Clearly, Title VII, Title IX, and the Equal Pay Act have had a dramatic effect upon college and university litigation. Having a somewhat lesser but nevertheless significant impact are two related laws: Section 504 of the Rehabilitation Act, which became effective in 1973, and the Americans with Disabilities Act of 1990, which became effective in 1992. From 1973 through 1980, Section 504 produced only 14 reported cases involving colleges an universities; but from 1981 though 1997, Section 504 has produced over 150 reported cases. The relatively recent ADA began producing reported decisions in 1993 and has produced a total of 126 reported decisions through 1997.

Of far less significance, at least from the standpoint of reported cases, are FERPA, which has produced only 20 reported decisions since its inception in 1974, and the FMLA, which has produced only 7 reported decisions since its inception in 1993.

THE CLI HIGHER EDUCATION LITIGATION INDEX™

CHART C



Although the foregoing numbers clearly demonstrate that federal regulation has been a major force behind the litigation explosion, it also appears that the number of cases involving given individual federal laws continues to increase. For example, although the annual number of Title VII cases clearly plateaued in the 1980s, the number has risen sharply during the 1990s. (*See Chart* C.) A similar phenomenon may be observed with cases involving Title IX. These trends suggests that perhaps other factors, such as political correctness, public awareness of gender and racial inequities, or a general tendency to view litigation as the primary approach to resolving disputes, are contributing significantly to the litigation explosion.

IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL PERSON SHOULD BE SOUGHT.

General Board of Higher Education and Ministry
The United Methodist Church
P.O. Box 871
Nashville, Tennessee 37202-0871

Lex Collegii ISSN 0749-9078 is published quarterly, spring, summer, fall, and winter by College Legal Information, Inc. **Lex Collegii** is a registered trademark of College Legal Information, Inc. **Lex Collegii** is provided free to United Methodist-related college and university personnel; for others there is a subscription rate. All subscription inquiries and general correspondence should be addressed to:

Lex Collegii
College Legal Information, Inc.
P.O. Box 150541
Nashville, Tennessee 37215

Copyright © 1998 by the General Board of Higher Education and Ministry, The United Methodist Church, Nashville, Tennessee, 37202.

BEST COPY AVAILABLE

Vol. 22, No. 3 Winter, 1999

Lex Collegii

A Legal Newsletter For Independent Higher Education

Contents

College Housing: New Challenges to Old Services 1
Interrogatories: Collegiality 7

Editorial Board

Kent M. Weeks
Editor and attorney

Paul Hardin
Attorney and former chancellor, University of North Carolina, Chapel Hill

Phil Moots
Attorney

Linda Lorimer
Attorney and Secretary, Yale University

Vic Hahn
Attorney and vice president, Capital University

Lex Collegii
College Legal Information, Inc.
P.O. Box 150541
Nashville, Tennessee 37215

College Housing: New Challenges to Old Services

The nature and function of college housing on U.S. campuses has changed dramatically. Years ago, students lived in dormitories overseen by a director of dormitories. The definition of a dormitory denoted limited activity—it was a place for students to live on campus.

As the notion of student development changed, new ideas around student housing changed also. Dormitories were renamed residence halls and were managed by directors of residential life. With this shift, a program orientation developed where student living facilities were not only a place to sleep, eat, and play, but places for programs, seminars, and an increased quality of life that was not always fostered in the previous dormitory approach.

Many colleges have spent millions of dollars refurbishing or redesigning their residence halls to incorporate a greater variety of living options and to accommodate students who want more commodious living conditions. On the other hand, many colleges do not provide sufficient residence hall space and students must increasingly find accommodations off campus. Off-campus accommodations provide additional challenges to the institution in terms of regulation, control, and fostering responsible student behavior.

The nature of residence hall life has changed and additional regulations and challenges to residence hall policies and programs have occurred.

This article will examine several recent challenges to residence hall policies requiring students to live on campus and those affecting disabled students. As the nature of residence hall life and college policies change, students are becoming more creative in mounting new challenges and in invoking the full panoply of federal and state legislation protecting them from nondiscrimination on the basis of race, sex, national origin, disability, age, and religion.

Required Residence Policies

Religious Discrimination

Douglas Rader, an 18-year-old freshman at the University of Nebraska-Kearney (UNK) challenged the parietal rule which

requires on-campus residency of all full-time freshman students. His challenge was based on a constitutional claim that the rule violated his First Amendment right to free exercise of religion.

According to UNK administration, the parietal rule: (1) fosters diversity; (2) promotes tolerance; (3) increases the level of academic achievement; and (4) improves the graduation rate of its students. The policy also ensures full occupancy of UNK residence halls.

Off-campus accommodations provide additional challenges to the institution in terms of regulation, control, and fostering responsible student behavior.

The policy requires all full-time freshmen to live on campus. There are, however, three stated exceptions to the policy: students living with their parents or guardians within the community, freshmen who are 19 years or older on the first day of class, and freshmen students who are married. If a freshman student decides not to live on campus, the student must submit a petition for an exception to the freshman housing policy.

If a freshman meets one of the stated criteria, the student is not required to live on campus. In addition, certain exceptions are granted at the discretion of UNK administrators. More than one-third of the full-time freshmen do not live in residence halls.

There are penalties for failure to conform to the policy and to sign a valid housing contract. These penalties include the suspension of the student's course registration, grades, and other university services.

Rader was raised in a religious environment and was a member of the Christian Church of Trumbull, Nebraska. According to his testimony, he and his family believed that "the Bible is the word of God; it instructs them how to live their daily lives and entreats them to make decisions which they believe glorify God." According to the trial court record, Rader testified there is no area of his life outside the influence of his faith and his beliefs required him to abstain from smoking, premarital sex, the consumption of alcohol and drugs, and the use of profanity.

During Rader's senior high school year, he considered a number of colleges. He chose UNK because of its agribusiness program and was recruited to play for the men's varsity basketball team.

Rader wanted to move into an off-campus house sponsored by the Christian Student Fellowship (CSF) in which students with beliefs similar to his lived. He knew of the freshmen residence hall policy and applied for an exception when he wrote to the university:

I have been raised in a distinctly religious home, founded solidly upon Christian principles. The Christian Student Fellowship is an organization our church has sponsored and my family has supported for many years.

As part of his rationale for seeking an exemption from the policy, Rader wrote he had heard a great deal about the UNK residence halls and their "obnoxious alcohol parties," the "immoral atmosphere," and the "intolerance toward those who profess to be Christians."

It was noteworthy that the CSF house was across the street from the UNK campus and according to the court was, in some cases, closer to the main campus than were certain residence halls. About 22 students resided in the house and there was a full-time campus minister, weekly Bible studies, counseling, prayer support, and evangelism training.

Rader's requested exemption to the policy on religious grounds was denied by Douglas Wermedal, an assistant director of residence life in April 1995. Rader then received a letter from the director of residence life threatening to drop him from classes unless he signed a housing contract to live in a residence hall.

Wermedal, a Baptist minister, who based his decision on his knowledge of residence life and his "religious expertise," believed that Rader's living in the residence hall would not be hostile to his faith and would not hinder his practice of religion. He also suggested that requiring Rader to live in the residence hall would help foster diversity and promote tolerance among UNK students. The testimony indicated that Wermedal did not make any independent investigation of Rader's request.

Rader challenged the adverse decision in federal court. (*Rader* v. *Johnson, 1996*) The court drew a distinction between UNK residence hall life and that in the CSF by contrasting the drinking, drug use in the residence halls, 24 hour visitations, condoms in the bathrooms, smoking, and off-color stories, to the environment of the fellowship house. Rader's father testified that there was a biblical statement reflecting his son's position in that Christ associated with "sinners" but in the evening he returned to live among his apostles and disciples.

The record reflects exceptions were automatically granted for the three reasons stated in the policy and many other exceptions were granted administratively because of "significant and truly exceptional circumstances which would make living on campus impossible." The court noted, however, many of the reasons did not really seem to conform to this definition and some students were exempted from the policy apparently because of alumni pressure or parental complaints to university authorities.

The residence hall policy had changed with the arrival of a new vice chancellor for student affairs in 1991. Prior to that, students who requested to live in the CSF house were granted auto-

matic exemptions from the policy. When the policy was changed there was; however, a concession that CSF members could live in a designated wing of a residence hall. The change in policy, it was argued, would foster academic success and diversity in the life of residence halls and would not have an adverse effect on the religious belief of any UNK student. The university, to further support its rationale for the residence hall policy, cited a compilation of studies that suggested on-campus residency during the freshman year promotes academic success and fosters diversity. One study concluded that students who live at home do not encounter religious diversity and are "insulated from any of the potentially challenging effects of close and continuing associations with other students whose religious values may be quite different."

First Amendment Challenge

UNK is a public institution, and Rader challenged the policy based on the U.S. Constitution and its protections for free exercise of religion. The trial court discussed the constitutional challenges and the legal framework in which constitutional claims must be analyzed. Constitutional challenges are not generally applicable to independent institutions. (See *Lex Collegii*, Fall 1988)

The court also discussed the policy and the stated exemptions and the fact that administrators granted many other exemptions, none of which included religious reasons. The court ruled:

The defendants in this case have created a system of 'individualized government assessment' of the students' requests for exemptions, but have refused to extend exceptions to freshmen who wish to live at CSF for religious reasons. Accordingly, I conclude the parietal rule cannot be viewed as generally applicable to all freshmen students.

The court ruled that the application of the rule was not neutral in its effect since many other reasons were justified for awarding exception to the policy but not one for religion. In addition, the court noted that applying the policy based on someone's personal religious experience does not conform to the constitutional standard of neutrality. The court also ruled there to be no compelling interest in the policy of the university even though the policy reasons were legitimate. The court based its reasons on the fact that approximately one-third of the students were granted exemptions which undermined any compelling state interest to require all students or Douglas Rader to live in the residence halls.

Finally, the court found that living in the CSF facility met many of the underlying reasons for the freshman residency policy. The facility was close to the college campus, it provided student services to those who live in the house, and there was diversity because foreign students also lived in the house. The court determined that the "goals of the university in fostering diversity and ensuring the academic success of the students are to a large extent met by his residency at CSF."

Even though the ultimate ruling in this case was based on constitutional interpretation and standards, the point of the factual assessment is that if colleges promulgate policies that require freshmen to live on campus, the policies should be applied evenhandedly and equitably. In this case, the court found the evenhandedness missing. A similar ruling could be applied to policies of independent colleges where a court determined their application was without rationale and therefore arbitrary or unreasonable and should not be enforced.

Religion and Other Challenges

For a similar reason but employing different legal challenges, four students at Yale College of Yale University, challenged the policy that freshmen and sophomores must live on campus. (*Hack v. President and Fellows of Yale College*, 1998) Yale's housing facilities were all coeducational. The college did not operate single-sex residence halls. Freshmen who are 21 or married are exempted from the policy.

The plaintiffs, Elisha Hack, Jeremy Hershman, Batsheva Greer, and Lisa Friedman, were either freshmen or sophomore students at Yale College. They challenged the policy because it violated their religion, and therefore, ran afoul of certain federal statutes, one of which required state action.

The nature of residence hall life has changed and additional regulations and challenges to residence hall policies and programs have occurred.

The students were orthodox Jews "whose religious beliefs and obligations regarding sexual modesty forbid them to reside in the coeducational housing provided and mandated by Yale." Their request for an exemption was denied. The students were charged for their residence room, which they paid, although they chose to live off campus in housing that provided "an appropriate environment in which to practice [their] faith."

The students sued Yale based on a civil rights statute that requires state action. Upon a motion to dismiss, the court found no state action present under the requirements of the state action doctrine and accordingly dismissed the students' civil rights claims. The doctrine of state action is generally not applicable to an independent institution. (See *Lex Collegii*, Fall 1988).

Second, the students alleged that Yale violated the federal Fair Housing Act. The essence of their argument was that they were discriminated against by requiring them to live in coeducational housing, by treating their requests different from other requests, and by exempting other students while not granting them an exemption. In

response, Yale argued that rooms were provided to the students and were available to them and this met their obligations under the federal statute. The court, for technical reasons, ruled the students did not have standing to pursue their claim under the act.

Third, the students alleged violation of the Sherman Antitrust Act. Again, the court in a fairly technical assessment, ruled that the act did not apply to Yale's denial of an exemption from its housing policy.

The court noted that applying the policy based on someone's personal religious experience does not conform to the constitutional standard of neutrality.

This litigation demonstrates the creative measures students employ to challenge housing policies. In this case, the student strategy of employing federal civil rights and housing laws and monopoly theories were unsuccessful.

Monopoly Challenges

Hamilton College founded in 1812, in Clinton, New York, became coed in 1978. For many years, it had a policy that first-year students were required to live in college-owned housing and must participate in a college-run meal plan. Other students were permitted to live off campus, including living in fraternity houses.

Hamilton, however, began to change the residential policy in the spring of 1994 by restricting the number of students who could live off campus. Effective September 1995, Hamilton instituted a policy that all students would be required to live in college-owned facilities and must purchase college-sponsored meal plans.

Four fraternities challenged the program under antitrust legislation, including the Sherman Antitrust Act, seeking damages, injunctive relief, and attorneys' fees. (*Hamilton Chapter of Alpha Delta Phi, Inc., et al.* v. *Hamilton College*, 1997) The fraternities contended the new residential plan had a commercial purpose and was designed to allow Hamilton to "exercise monopoly power as the sole available buyer by attempting to purchase the fraternity houses at artificially low prices, intending to use them to provide housing for its students." The policy, it was argued, violated the Sherman Antitrust Act.

Hamilton defended its policy by submitting affidavits and other evidence to the court that its purpose was to "create an academic environment that is more appealing to female applicants to Hamilton." As part of its evidence, the college submitted a statement from the chairman of the board of trustees that some women students were transferring because they did not enjoy the same housing situations as men and that Hamilton "is in danger of being perceived more for its social life than for its academic rigor."

Hamilton moved to dismiss the complaint based on the fact that the alleged activities were not covered by the Sherman Antitrust Act. The district court granted Hamilton's motion to dismiss, and the fraternities appealed.

On appeal, the federal appellate court focused on the question of whether the activities of Hamilton College were commercial in nature, a finding required to invoke the Sherman Antitrust Act. The court acknowledged there was a spectrum of activities of nonprofit institutions, some of which were clearly noncommercial, some of which were clearly commercial, and some of which represented close cases. The court cited a 1993 decision regarding Ivy League colleges and the antitrust implications of their agreement on the admission of students and the awarding of financial aid packages.

Hamilton asserted that its activities were noncommercial and solely based on educational reasons. The fraternities tried to refute this argument by alleging the plan had a commercial purpose to: (1) force all Hamilton students to purchase residential services from Hamilton; (2) allow Hamilton to raise its prices for such services; and (3) attempt to purchase the fraternity houses at below-market prices.

The court concluded that at this stage in the proceedings, these allegations must be accepted as true, and therefore, the lower court decision to dismiss was in error.

Second, the court reviewed whether there was an adequate effect on interstate commerce to support the colleges alleged illegal conduct. The appellate court concluded there was.

Accordingly, the court reversed the trial court's motion to dismiss and ruled that the case should go forward for further discovery and possible trial on the merits.

Following the decision, the parties commented on the ruling. The fraternities' position was that Hamilton is covered under the antitrust law and could have controlled the social life of students without effectively closing the fraternities. Hamilton argued there was no economic motive behind the institutional policies. Instead, the policy was intended to end the domination of campus social life by fraternities. Eugene Tobin, president of Hamilton, commented that he was disappointed by the ruling: "in the two years since the new policy was adopted, we have enrolled our strongest first year class in a decade and set records for alumni giving."

Obviously, this kind of situation may create continual conflict over the application of antitrust policies to residential hall policies. In most cases, colleges will not need to confront such challenges, but the approach is available and has been used in two recent cases.

Disabled Students

Kristy Coleman, a 21-year-old with cerebral palsy applied to and was accepted at the University of Nebraska

at Lincoln. Under its housing policy, students could select a roommate, a single room, or choose to enter into a roommate pool in which case they would be assigned a roommate and a double room.

Coleman's cerebral palsy required her to use a wheelchair and the services of a personal attendant to assist with dressing, showering, and toileting.

Coleman submitted a residence hall contract and requested a double room. She expected to be randomly assigned a roommate. When she arrived on campus in the fall of 1991, she found she had been assigned a room without a roommate. The reason for the failure to assign a roommate was based on university policy that specifically addressed students with disabilities: "double rooms will not be assigned if personal attendant service, nursing care, or trained animal assistance is required unless there is a mutual room request." The university provided a special grant to cover the difference between a double and single room rate so Coleman did not have to pay additional for the single room.

Testimony indicated the university applied this policy consistently and did not make any individualized inquiry concerning the nature of Coleman's disabled condition. The residence hall policy also declared the university was bound by federal law regarding nondiscrimination on the basis of disability.

The university position was that Coleman could have a roommate but the university would not assign one. According to the university, the policy was designed to eliminate both the embarrassment to an assigned roommate and the disabled student and to eliminate the "hurt feelings and administrative worries that followed" from certain roommate change requests.

Coleman filed a complaint with the U. S. Department of Education, Office of Civil Rights that was initially settled on the basis of the university's commitment to try to find her a mutually acceptable roommate for the following year. The university tried several different ways to obtain a roommate on a volunteer basis and was unsuccessful.

Ultimately, the university made a broad search and offered a $500 reduction from the double-room charge if a student would agree to room with Coleman. Six female students contacted the university, but no one was interested. Coleman acknowledged the university had attempted to find her a roommate, but she was offended by the approach the university took and by their adamant refusal to require another student to be her roommate.

Coleman asserted she wanted a roommate in order to make friends and encounter someone with a different lifestyle and interests. As the court noted she wanted: "the growth experience of rooming with another college student while attending UNL."

This environment includes creative lawyers and students and new federal and state statues on which lawsuits can be mounted.

Coleman filed a lawsuit against the university alleging discrimination on the basis of disability under the Rehabilitation and Americans with Disabilities Acts. (*Coleman* v. *Zatechka, 1993*)

After an extensive analysis of the Rehabilitation Act of 1973 and the Americans With Disabilities Act of 1990, the court ruled that Coleman was protected by these acts. The court examined whether Coleman was a qualified individual as required under the two legislative mandates. The court found she was disabled and was protected by the statutes, and then addressed whether Coleman met the eligibility criteria for the housing program.

The university argued that there were two essential eligibility requirements which were necessary to the roommate assignment program. First, in order to qualify to participate in the assignment program, a student must not utilize more than half the space in the room. The court seriously questioned this requirement in terms of its applicability to Coleman since there was no inquiry as to how much space Coleman would actually use. In addition, the court noted that students could enter into the roommate assignment policy if they had a wheelchair as long as they did not require attendant care. Third, the court found that the issue of how much room within a room a student uses was an open question and there was no equal space utilization requirement. The court rejected this as an essential eligibility requirement.

Second, the university argued that Coleman was not qualified for the program because of the required three daily visits by a personal attendant that would be unfair to a roommate. The court did not accept the testimony the visits would be disruptive since they were predictable and relatively brief. In addition, Coleman was apparently willing to schedule the visits at times less likely to disturb a roommate and to meet the attendant for some activities in the bathroom.

Furthermore, the court noted there was evidence that many of the residence hall rooms had frequent visitors, and there was no limitation on such visits. The court also found the 24 hour unlimited visitation rule caused frequent interruptions to the common room area.

In sum, the court found these two eligibility requirements were not essential to the program, and therefore, could not be used as a basis for excluding Coleman.

Finally, the university asserted it was unfair to require students without disabilities to room with students who have disabilities and require them to be part of attendant care situations. The court did not embrace this notion. It suggested such an attitude really continued the stereotypes which the acts in question were designed to eliminate.

The university's policy at issue here of

excluding plaintiff from the roommate assignment program, however well intentioned it may have been, sanctions the attitude that students with disabilities are less desirable and suggests that others should not be required to live with them. Such standoffishness places less value on the human worth of individuals with disabilities—because of their disabilities.

This case points to the serious competing claims of students and university policies and the careful and individual analysis required for responding to challenges by students with disabilities.

Most colleges view residence hall life as integral to the campus and want it to foster institutional commitments and values.

Preventive Planning

These cases reflect the new environment in which colleges operate. This environment includes creative lawyers and students and new federal and state statutes on which lawsuits can be mounted. Clearly, antitrust laws were not considered to be particularly relevant to higher education at their inception. Only recently, with the decision involving the Ivy Leagues was there serious concern about the application of antitrust laws to the noncommercial activities of higher education institutions. If a college appears to possess monopoly power, students may be prompted to raise antitrust protections.

Housing policies and required residence policies must be applied evenhandedly. Obviously, there can be exceptions, but these must be granted in a rational way that does not appear to be whimsical or discriminatory. If such a finding is made, a court could rule an independent college's policies irrational or unreasonable, and therefore, not enforceable.

The educational rationale for having residence hall policies should be documented and, if possible, supported by research findings. Most colleges view residence hall life as integral to the campus and want it to foster institutional commitments and values.

Colleges must be sensitive about accommodating disabled students who are mobility impaired or who have other special needs. As with all disability claims, individual investigation and assessment, negotiation, openness, and thoroughness are critical to a satisfactory outcome. Mandatory residence hall policies require sensitivity to the claims of disabled students and reasonable accommodation to legitimate needs.

—*Kent M. Weeks*

Selected Bibliography

Cases

Coleman v. *Zatechka et. al.*, 824 F. Supp. 1360 (D. Neb. 1993).

Hack v. *President and Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998).

Hamilton Chapter of Alpha Delta Phi, Inc. et al. v. *Hamilton College*, 128 F. 3d 59 (2nd Cir. 1997).

Rader v. *Johnston et. al.*, 924 F. Supp. 1540 (D. Neb. 1996).

Articles

Fellrath, A., "Coleman v. Zatechka: The ADA and Student Life," 23 *Journal of College and University Law* 285 (1996).

Kaufman, H., "Access to Institutions of Higher Education for Students with Disabilities," National Association of College and University Attorneys, 1994.

Weeks, K., "Disabled Students in the Nonacademic Setting," 20 *Lex Collegii* (Winter 1997).

Weeks, K., "The Constitution and Independent Colleges," 12 *Lex Collegii* (Fall 1988).

Interrogatories

Collegiality

"Interrogatories" is a column that responds to readers' questions. Send questions to: *Lex Collegii*, P.O. Box 150541, Nashville, Tennessee 37215-0541. Recently we have received a number of inquiries about a Lex Collegii article on collegiality and recent case law.

Question: Is collegiality an appropriate factor to use in the assessment of faculty for promotion and tenure?

Answer: Yes, especially when it is stated as a criterion for such assessment.

Question: Can collegiality be used if it is not a specifically stated criterion?

Answer: Probably. Courts are realistic about the essential qualities faculty need to work effectively and recognize it is important that colleagues demonstrate collegiality.

Question: What recent case law is there on the issue of collegiality as a factor in faculty personnel decisions?

Answer: A recent article in *Lex Collegii*, "Collegiality and the Quarrelsome Professor," Summer 1996, provides an analysis of cases clearly supporting the notion that collegiality can be used in faculty employment matters. Subsequently, a number of recent decisions have reaffirmed this analysis.

Question: What specifically have the courts ruled?

Answer: In two recent cases involving Kent State University and the University of Baltimore, the court supported collegiality as a factor to defend against claims of breach of contract, wrongful discharge, and discrimination.

Question: What did the courts do?

Answer: In the University of Baltimore litigation, the court sustained a collegiality claim against the faculty member's contention it was not one of the listed criteria for promotion and tenure.

We are persuaded that collegiality is a valid consideration for tenure review. Although not expressly listed among the School's tenure criteria, it is impliedly embodied within the criteria that are specified. Without question, collegiality plays an essential role in the categories of both teaching and service.

In the Kent State litigation, the court rejected the faculty member's claim of discrimination and granted summary judgment in favor of a college. The court found: "The ability to get along with coworkers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions."

Question: What other sources suggest that collegiality is an appropriate criteria?

Answer: The AAUP in a statement on professional ethics embraces the notion:

As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas, professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.

Question: How is this concept likely to develop?

Answer: Courts are likely to support assessments based on the ability of faculty to be collegial and to work with colleagues both within and outside their respective departments. Collegiality is also embraced in the evolving and more expansive definition of professional ethics. In future issues of Lex Collegii, the notion of collegiality and its relationship to faculty evaluation will be further analyzed.

—*Kent M. Weeks*

General Board of Higher Education and Ministry
The United Methodist Church
P.O. Box 871
Nashville, Tennessee 37202-0871

IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL PERSON SHOULD BE SOUGHT.

Lex Collegii ISSN 0749-9078 is published quarterly, spring, summer, fall, and winter by College Legal Information, Inc. **Lex Collegii** is a registered trademark of College Legal Information, Inc. **Lex Collegii** is provided free to United Methodist-related college and university personnel; for others there is a subscription rate. All subscription inquiries and general correspondence should be addressed to:

Lex Collegii
College Legal Information
P.O. Box 150541
Nashville, Tennessee 37215

Copyright © 1988 by the General Board of Higher Education and Ministry, The United Methodist Church, P.O. Box 871, Nashville, Tennessee 37202.

Vol. 22, No. 4 Spring, 1999

Lex Collegii

A Legal Newsletter For Independent Higher Education

Contents

Age Discrimination and Performance Assessment 1
Interrogatories: Sexual Harassment of Students by Faculty 7

Editorial Board

Kent M. Weeks
Editor and attorney

Paul Hardin
Attorney and former chancellor, University of North Carolina, Chapel Hill

Phil Moots
Attorney

Linda Lorimer
Attorney and Secretary, Yale University

Vic Hahn
Attorney and vice president, Capital University

Lex Collegii
College Legal Information, Inc.
P.O. Box 150541
Nashville, Tennessee 37215

Age Discrimination and Performance Assessment

Introduction

The Age Discrimination in Employment Act (ADEA) was enacted by Congress in 1967 to prohibit discrimination in employment on the basis of age. The ADEA prohibits employers from discriminating with respect to compensation, terms, conditions, or privileges of employment because of an individual's age. The Equal Employment Opportunity Commission (EEOC) has enforcement authority over the Act.

Historical Background

The Act originally protected workers between the ages of 40 and 65. Later, coverage was extended to age 70. The 1986 amendments to the ADEA eliminated the 70 year age limit entirely with certain exceptions. One exception allowed colleges and universities to continue requiring tenured faculty members to retire at age 70 through December 31, 1993. Within that amendment, Congress mandated a study be undertaken to determine the implications of the extension of mandatory retirement beyond the established date. The National Research Council completed its study and submitted its recommendation to the EEOC in May 1991. It concluded the mandatory retirement exemption for higher education should be eliminated. The report contained many recommendations and findings, including:

- the previous rise in coverage from 65 to 70 had only a small effect on the availability of jobs for younger female and minority employees
- few tenured faculty would continue working beyond 70 if mandatory retirement were eliminated
- at some research universities, a higher proportion of the faculty would choose to work past age 70 if mandatory retirement is eliminated. These professors were more likely to stay on longer because they generally have lighter teaching loads.

Based in part upon the results of the study, Congress permitted the exemption to expire at the end of 1993.

The Burden of Proof

Faculty members can prove their ADEA claim either through direct evidence or upon a showing of disparate treatment based on their age. Direct evidence proves the underlying discrimination without any inferences. An example of such evidence would be testimony from a

supervisor who was instructed to fire an employee because of the employee's age. In most cases, however, the litigant has little or no direct evidence of age discrimination and is forced to rely upon circumstantial evidence. Therefore, the courts have relied upon the *McDonnell Douglas* test from Title VII (employment discrimination) to demonstrate a disparate treatment claim.

The *McDonnell Douglas* standard requires the complaining party first establish a *prima facie* case of age discrimination. The faculty member must present evidence that he or she: (1) was a member of a protected class (i.e., at least 40 years old); (2) was qualified for the position; (3) received an unfavorable employment decision because of discrimination based on age; and (4) was displaced by a person outside the protected group.

Proof of the *prima facie* case of age discrimination creates a presumption the employer engaged in impermissible age discrimination.

In 1996, however, the Supreme Court held that a plaintiff need not necessarily show the replacement was under age 40. Rather, the court indicated satisfaction of this element required showing the replacement was substantially younger. (*O'Connor* v. *Consolidated Coin Caterers Corporation*, 1996) Federal circuit courts of appeals have had conflicting interpretations of this standard. Some circuits have held three years is sufficient while others have held five years is not enough. (*Carter* v. *DecisionOne Corp*, 1997) To demonstrate qualifications for a position, a complainant in a university case most likely would provide a positive performance review.

Proof of the *prima facie* case of age discrimination creates a presumption the employer engaged in impermissible age discrimination. The employer may rebut this presumption by producing evidence the employment decision was based on legitimate nondiscriminatory reasons. This burden has been described as exceedingly light. The most common reason offered by employers is that an employee was denied promotion or tenure or not renewed for good cause, such as the employee failed to meet the stated position requirements. The best evidence of good cause is an evaluation that outlines inadequate job performance. There may be other objective reasons for termination, such as elimination of a position for financial or program reasons.

If the employer carries its burden, the employee must then produce evidence to show the proffered explanation is a mere pretext for unlawful age discrimination. The courts have tried to clarify the respective burdens of persuasion required of the college and of the employee. It is generally agreed the employee must prove age was the determining factor or was the real reason for the adverse employment decision, and that but for the employer's motives to discriminate, the employee would not have been discharged.

An employee can prove pretext by showing the college's reasons have no basis in fact, by showing the reasons were not really factors in motivating the employment decision, or, if they were factors, they were jointly insufficient to motivate the action. The courts have suggested that even though age might be a consideration, it must be a major or determining factor in the employment decision to trigger a violation of ADEA.

Once an employee has presented evidence of pretext, an issue of fact is presented and trial must proceed. Before this time, the case is disposable through summary judgment. Summary judgment allows for disposition of a case without a trial where the court finds there is no dispute of material fact or that only a question of law is involved.

State University Immunity and the 11th Amendment

Recently, several states have resisted the application of ADEA requirements to their state employees, including employees of state universities. The Eleventh Amendment states: "The Judicial Power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." It has long been accepted, however, that Congress may abrogate the states' Eleventh Amendment sovereign immunity. The Supreme Court has set forth a two-prong test to determine whether Congress has abrogated a state's sovereign immunity: (1) whether Congress unequivocally expressed its intent to abrogate the states sovereign immunity; and (2) whether Congress acted pursuant to a valid exercise of its power. (*Seminole Tribe of Florida* v. *Florida*, 1996)

Initially, the ADEA explicitly excluded states and their political subdivisions from the definition of employers. The 1974 ADEA amendment, however, expanded the definition of employer to include a state or political subdivision of a state or any agency or instrumentality of a state. The majority of federal appeals courts have concluded Congress could not have made its desire to override the states' sovereign immunity more clear.

A threshold examination for the second part of the test is a determination of whether the ADEA was passed pursuant to congressional power under the commerce clause or under the equal protection clause of the Fourteenth Amendment. The Supreme Court has held Congress could not abrogate the immunity via legislation passed pursuant to the commerce clause. Since then the majority of federal circuit court of appeals have held that the ADEA was passed pursuant to power under the Fourteenth Amendment and therefore Congress effectively abrogated state immunity.

The Supreme Court recently agreed to hear an appeal holding Congress had effectively abrogated the states' Eleventh Amendment sovereign immunity. (*Kimel* v. *Florida Bd. of Regents*, 1998) It could turn out that public institutions are not subject to ADEA challenges unless Congress takes further action.

Exceptions to ADEA Provisions

Tenured Faculty Exemption

Congress has complicated the retirement process for faculty members at

colleges and universities by not renewing the ADEA exemption for tenured faculty. In 1995, about 550,000 full-time professors were working in higher education, according to a study by the U.S. Department of Education. Based on data collected in 1992, nearly half of the country's full-time professors were age 50 or older, and many were over 60. It is generally believed that uncapping has played a small role in the graying of the faculty to this point because so few professors have yet to reach 70. The implications may be different as a larger proportion of faculty reach that age.

According to a study completed by David Card, an economist at Berkeley, prior to 1994, two-thirds of professors who had reached the established retirement age quit teaching by the next year. His report also noted the increases in retirement rates for younger faculty has led to a substantial reduction in the number of faculty who teach until age 69.

Since the exemption expired in 1993, colleges with ample resources have used generous buyouts to thin their ranks. According to one report, one university retired 78 over-60 professors in 1996 with padded pensions and additional cash payments. Hundreds of less-endowed institutions, however, cannot afford such generous buyouts.

Policymaker Exception

The ADEA also contains an exception for any employee in a high policymaking position. Some have suggested mandatory retirement for tenured faculty is consistent with the concerns underlying the ADEA's exemption for policymakers.

The EEOC has interpreted high policymakers as "individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof." Advocates have suggested full professors are policymakers for the university in that they set curriculum, create new academic departments, and determine eligibility criteria for faculty hiring and student admissions.

Bona Fide Occupational Qualification

The ADEA states: "It shall not be unlawful for an employer . . . to take any action where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business." Courts have developed a two-prong test of BFOQ. The employer must first show that if employment decisions were not based on age classifications, then "the essence of the business operation would be undermined." (*Usery* v. *Tamiami Trail Tours*, 1976) Second, the employer must set forth an objective factual basis for its determination that members of the affected class would be unable to perform the job properly or that dealing with members of the class individually would be highly impractical. Employers may claim they were compelled to rely on age as a proxy for job qualifications, such as safety. Maximum hiring ages for bus drivers and pilots have satisfied the requirements for this exception. A university would need to demonstrate a nexus between the college's stringent job requirements and its mission of safety.

The best evidence of good cause is an evaluation that outlines inadequate job performance.

Courts have determined the BFOQ was meant to be an extremely narrow exception to the ADEA. However, the legislative history of the ADEA suggests maintaining an age balance is a legitimate goal in certain businesses. Therefore, if a university could demonstrate age balance is critical for guaranteeing the diversity of ideas that encourage intellectual stimulation and scientific advancement, classification based upon age might be deemed appropriate.

Reasonable Factors Other Than Age

The ADEA declares it is not unlawful for employers to take actions where differentiation is based upon "reasonable factors other than age (RFOA)." The act gives no indication of what constitutes a reasonable factor or of how close the connection may be between a reasonable factor and an outright age classification before the classification becomes impermissible.

The RFOA language has been interpreted to suggest employment policies made for reasons independent of age but which happen to impact an older employee are not actionable under the ADEA. (*EEOC* v. *Francis W. Parker School*, 1994) For example, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in the decision-making process and had a determinative influence on the outcome.

The most obvious legitimate reasons include failure to meet required standards of competency for employment, promotion, tenure, or retention or the lack of need for the particular position. In the context of higher education, some additional considerations are possible without explicit reference to age and without undue impairment of traditional concepts of tenure. For example, a professor's performance could be partly measured objectively, as in the case of a scholarly productivity requirement. Similarly, faculty members, young and old, in outdated disciplines could be given the option of moving into a needed area of expertise or leaving.

In an ADEA action, the court's review is limited. It will attempt only to determine whether the wrong criteria were used, not whether the institution reached the correct decision when it applied the criteria.

Age Discrimination in Faculty Employment

Failure to Promote

Margaret Hines was a seventy-four-year-old associate professor in the College of Medicine at Ohio State University. She was a tenured member of the department, where she had been employed since 1962. Hines sought promotion to the rank of full professor four times but was refused. Each of the first three times, she was recommended by her department promotion and tenure committee but rejected at higher levels of the university. After her third denial, Hines filed a complaint with the EEOC alleging age and sex discrimination.

Hines then instituted a lawsuit.

(*Hines* v. *Ohio State*, 1998) Subsequently, she reapplied for tenure. This time, she was not recommended for tenure by her department. Instead, she put her own name forward as a candidate for promotion. She was rejected for tenure again. She filed another complaint with the EEOC alleging retaliation for her pending lawsuit.

Each candidate at Ohio State is evaluated using three criteria: teaching, research, and service. These qualifications are judged in part through review of a dossier detailing each candidate's academic credentials and accomplishments. Ohio State argued that Hines failed to meet her burden of a *prima facie* showing of discrimination because she failed to show she was qualified for the promotion. The university stated her shortcomings included her performance on the research criterion. She offered evidence that contravened the university's contention that research was the most heavily-weighted factor. In addition, she produced evidence that showed other candidates with research records similar to hers were promoted and deemed qualified. The court found she had met her burden.

Advocates have suggested full professors are policymakers for the university in that they set curriculum, create new academic departments, and determine eligibility criteria for faculty hiring and student admissions.

As far as the university's legitimate nondiscriminatory reason, the university asserted that Hines' research record was insufficient to warrant promotion to full professor. Hines, therefore, had the burden of showing this reason was mere pretext.

Hines claimed this reason was insufficient to motivate the university given the promotion of similarly situated individuals. Further, it appears the court was influenced by testimony that two members of the department review committee made remarks "regarding a desire to create opportunities for younger faculty members." The court found Hines had raised a genuine issue of material fact with regard to the pretext question. This was sufficient to withstand a motion for summary judgment.

An example of a court requiring data and not just anecdotes to justify age discrimination involves Charles Kuhn, an assistant professor of music at Ball State University. Kuhn argued that the university failed to promote him even though he had been promoted to assistant professor, had a satisfactory record and would have been promoted except for a lack of a Ph.D. and for certain budgetary restraints. He filed an age discrimination lawsuit in which the federal district court sided with the university. (*Kuhn* v. *Ball State University*, 1996)

On appeal, Ball State argued that Kuhn failed to meet the promotion standards in effect at the time of Kuhn's promotion review of superior achievement and that satisfactory performance as an assistant professor did not entitle him to a promotion. As the appellate court noted: "Universities prune the ranks—sometimes ruthlessly, so that only the best rise."

The appellate court was critical that Kuhn failed to produce any statistical data to justify his position. He pointed to one other professor who was younger and who was promoted. The court wanted more:

Once Ball State explained its decision not to promote him, Kuhn had to come forward with evidence to suggest, not that the University was mistaken in failing to promote him, but that it was lying in order to cover up the true reason, his age. Kuhn's evidence does not move far toward suggesting mistake; it does nothing to suggest that the explanation he received was disingenuous. Statistical tools were available—and a faculty member at a university, unlike the ordinary plaintiff, has only to amble over to his colleagues in the statistics department to explore the possibility.

Accordingly, the appellate court sustained the lower court's decision to grant summary judgment to the university.

Denial of Tenure

Cynthia Fisher was hired by Vassar College as a visiting assistant professor of biology in 1977. She was placed in a tenure-track position in 1980. In 1982, she was reappointed for a three-year term, after which she was to be reviewed for tenure. A five-person committee undertook to review her candidacy for tenure, based upon four categories: scholarship, teaching ability, leadership, and service. The committee found Fisher deficient in all four areas and unanimously recommended she be denied tenure.

In accordance with Vassar's procedures, the committee report was reviewed by the chair of the biology department. Copies of the report were forwarded to the dean of the college, the president, and the Faculty Appointments and Salary Committee (FASC). All five members of the FASC voted against tenure. The dean and the president concurred. Acting upon these recommendations, the Board of Trustees denied Fisher tenure. Fisher's appeal to the FASC was rejected, and she left Vassar in 1986.

She filed suit initially alleging that the college had discriminated against her on the basis of sex. She subsequently amended her complaint to allege discrimination on the basis of sex as well as her marital status. At the close of her case, she again amended her complaint to include a claim for discrimination on the basis of age. (*Fisher* v. *Vassar College*, 1997)

The court evaluated Fisher's claim on the *prima facie* elements. It found Fisher had satisfied this burden because there was evidence that she was older than 40, suffered an adverse decision, and eight of nine other tenured faculty members in the department were younger than she when they were reviewed for tenure.

The court then found Vassar had satisfied its burden of providing a legitimate nondiscriminatory reason for its decision by asserting Fisher was denied tenure because she did not meet the prescribed standards for tenure and was less qualified than other candidates.

Fisher's evidence of pretext consisted

BEST COPY AVAILABLE

of anecdotes, purported admissions made by Vassar, and expert testimony. Evidence of discriminatory statements by several members of Fisher's department were introduced to support her lawsuit. Specifically, she testified a member of her department told her she was "too old to ever become tenured faculty," and that the biology department apparently believed she was "out of date—out of field for 10 years." The trial court found the asserted reasons pretextual and entered a verdict in favor of Fisher. The judgment included an award of $530,000 on the ADEA claim and nearly $100,000 in additional pension and Social Security contributions. In addition, Fisher would be eligible for a tenured position at the rank of associate professor. Reviewing all of the evidence and particularly the lack of statistical data provided by Fisher, the federal court of appeals disagreed with the trial court's evaluation of Fisher's claims and reversed the lower court's decision.

Denial of Perks

Eric Naftchi was a 69-year-old man who joined the faculty of the New York University School of Medicine as an associate professor in 1968 and was made head of the laboratories investigating spinal cord injuries. In 1979, two laboratories were taken from his control, and a third was reallocated to other uses in 1980 or 1981.

Naftchi published an article in the journal *Science* in 1982. Naftchi's analysis was apparently challenged and in response to that criticism, the medical school convened a panel to evaluate the quality of Naftchi's research. The panel issued a report stating that Naftchi's data were not adequate to support the claims made in his journal article.

As a result, the dean of the medical school informed Naftchi he would appoint an outside committee to review the matter. Additionally, no further grant applications were to be approved for submission unless they were accompanied by the letter stating the panel's concerns. It was not clear whether the outside committee was ever formed and whether the instructions regarding grant applications were ever enforced.

In the wake of the *Science* incident, Naftchi lost control of three additional laboratory rooms, a storage room, and refrigerator space. An additional laboratory was taken away in 1984.

Several years later, in response to a space shortage, a committee recommended space should be allocated with priority to those faculty with outside funding. By this point, Naftchi was down to his final lab. In June 1991, Naftchi applied for and was approved for an NIH grant. In July 1991, however, Naftchi's final lab was reallocated to another researcher whose research grant had already been funded. Naftchi's grant, though approved, was never funded.

Later in 1991, Naftchi unsuccessfully appealed to the dean for additional space. He then requested formation of a grievance committee. The committee recommended he be given limited funding for supplies and technical assistance to allow him to apply for additional grants. In response to this report, the dean then wrote to Naftchi stating he would be required to submit a detailed proposal before the funds would be released. After Naftchi submitted the proposal, it was rejected on the grounds that it was essentially the same as his previous grant submission that had never been funded.

Naftchi also alleged he was denied salary increases from 1994 onward. In addition, in March 1995, he was transferred from his former office to a smaller one, and then, in October 1997, even this space was taken away. Furthermore, Naftchi alleged he was denied travel funds, office supplies, and even access to photocopy facilities.

Naftchi filed suit alleging age discrimination in his treatment. (*Naftchi v. New York University*, 1998) The court first analyzed the claims based upon the allocation of lab space. The court, recognizing the *de minimus* nature of the requirements at the *prima facie* stage, found that the elements were satisfied. The court turned to the medical school's nondiscriminatory basis for its decisions.

The medical school's stated reason for denial of lab space was lack of external funding. Naftchi countered that his publication of articles and participation in conferences made him a productive member of the department. However, the court emphasized the law was not concerned with whether the university's criteria were wise, only whether they were nondiscriminatory. Therefore, the university had met its burden at this stage.

Naftchi next contended the focus on external funding was merely a pretext for lab allocation based upon age discrimination. The court, however, noted the relevance of the goal of increasing outside funding, particularly in times of scarce resources. Further, an inverse correlation between age and the awarding of federal grants would not prove the real reason for space allocation was age discrimination.

Next, the court evaluated Naftchi's claims based upon denial of salary increases. The university responded the raises were determined based on merit alone and that Naftchi's performance did not warrant a raise. The salary guidelines specified no raises were to be given to employees who did not meet minimum performance goals or job requirements. The chairman of the department testified performance was determined primarily by whether the faculty member received external grants.

Naftchi challenged the merits of using success in acquiring grants as the primary basis for determining salary increases. He felt background, experience, scholarship, and past contributions should be considered. The court reasserted its position that it would not evaluate the wisdom of the employer's standards, so long as they were not discriminatory.

The court granted the university's motion for summary judgment for the ADEA claims. However, it allowed Naftchi's claims based on retaliation to go to trial because the denial of salary increases and the final removal of office space had taken place after Naftchi's filing of his charge with the EEOC and his filing of the lawsuit.

Forced Retirement of Untenured Staff

Marilyn Heck was a seventy-year-old employee who worked as an assistant bookkeeper from January 1988 until June 1995 at the bookstore at Kenyon College. The majority of Heck's job involved data entry. She entered invoices into the computer and balanced the totals. After double-checking her work, she forwarded it to the computer department.

According to her supervisor, Heck had trouble with data entry. She would forward her work to the computer department without adequate review. After subsequently reviewing her work,

BEST COPY AVAILABLE

she would sometimes forward corrections to the computer department. The other department had difficulties in determining which version was correct since all copies were marked as balanced. Despite these troubles, Heck consistently received high marks on her performance reviews from her immediate supervisor until a month before her departure from Kenyon. The bookstore manager, however, testified he did not find her performance satisfactory.

Heck claimed that for several years she felt pressure to retire. She stated she had heard the bookstore director wanted to "get rid of some older employees if hiring new ones meant saving money." During 1994, the college instituted a new computer system. Heck claimed she did not receive adequate training on the computer system. As part of the new software, employees were advised not to use the computer on Thursdays because such use could cause part of the college system to crash. On March 16, Heck met with her supervisor who stated that her performance was unsatisfactory and she needed to improve her speed and accuracy on the computer. That same day, Heck allegedly caused the computer system to crash.

Heck was on vacation the week following the computer crash. When she returned, her manager informed her that because of her performance and the computer crash, she would have the option of retiring or being fired within 90 days. He further explained the preferable benefits received by retirees. She claims to have retired because she felt there were no other options available.

During the final 90-day period of her employment, Heck received her first written negative appraisal. Around this time, the college claimed they offered her another position at the college which she refused. She further claimed her manager became abusive and tried to force her to sign a resignation letter. On her final day at work, she was allegedly escorted out of the bookstore. Heck's position was filled by two part-time workers who receive no benefits. Heck filed suit alleging age discrimination. (*Heck* v. *Kenyon College*, 1998)

In evaluating her ADEA claim, the court found Heck proved she was a member of a protected class and her replacements were younger. The court found ample evidence of an adverse employment decision. The college contested on the basis that it had tried to accommodate her through other opportunities. Similarly, despite the college's objections, the court found Heck had proved she was qualified for the position by offering positive performance appraisals.

The court next addressed the college's claim that Heck's poor performance constituted a legitimate nondiscriminatory reason for her termination. The core of the court's analysis centered on Heck's claim that this was a pretext. Heck offered her positive performance evaluations as evidence. The court noted that it was Heck's performance at the time of her severance that was relevant and, therefore, the evaluations did not discredit the college's reason. The court found that regardless of whether Heck retired or was fired, the evidence demonstrated the college's motivation in Heck's departure was the computer crash. Therefore, the proffered reason was not pretextual. The court granted the college's motion for summary judgment.

Remedies and Damages

Many of the age discrimination cases are resolved on motions for summary judgment or settled soon thereafter. As one court noted, "employees and their counsel may well conclude that ADEA cases are won or lost on summary judgment, because jurors find it difficult to close their hearts to the plight of the terminated older employee but easy to open the purse strings of his employer."

Under ADEA, employees are entitled to a trial by jury of their peers. Upon finding a violation, a court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorneys' fees. Additionally, in the case of willful violation, the ADEA authorizes liquidated damages equal to the backpay award. Several courts also have allowed the litigant to seek damages for pain and suffering or emotional distress.

Although reinstatement is the preferred remedy in a discriminatory termination case, it is not always appropriate. When the court finds it inappropriate to reinstate an employee, it considers whether an award of future pay, known as front pay, is justified. Such a remedy is especially indicated when the employee has little prospect of obtaining comparable employment or the time period for front pay is relatively short.

A complainant who has prevailed on the merits is also entitled to an award of attorney's fees and costs. The party seeking the award of attorney fees has the burden of proving they are reasonable.

Preventive Planning

Suggested methods of coping with the illegality of mandatory retirement programs for tenured faculty have included proposals for reforming tenure through term contracts, periodic reviews, or early retirement incentives.

Early retirement programs, including phased retirement programs, are receiving increased attention as a result of the expiration of the tenure exemption. Such programs may frequently include benefits such as deferred compensation, bonus compensation, continued part-time teaching, enhanced contributions to pension programs, post-retirement consulting agreements, or continued privileges such as office space or honorary positions.

The best antidote to an age discrimination claim is a well-documented evaluation. The courts embrace the notion that whether the decision rests on good or bad judgment is not for them to decide if a college can demonstrate a valid reason for its personnel action. As one court stated, the question is whether the university "honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless."

As several of the cases demonstrate, stray remarks or unprofessional statements about faculty that arguably raise age issues, are harmful and unnecessary. Evaluators must understand the consequences of such assessments.

Accordingly, annual performance reviews, pre-tenure reviews and the increasing use of post-tenure reviews represent appropriate strategies to address competency and professionalism issues, represent good practice, and pose documented defenses to age litigation. A future issue of *Lex Collegii* will analyze emerging post-tenure review practices and their consequences.

—Kent M. Weeks
—John Bradford

Selected Bibliography

Cases

Carter v. *DecisionOne Corporation*, 122 F.3d 997 (11th Cir. 1997).
EEOC v. *Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994).
Fisher v. *Vassar College*, 114 F.3d 1332 (2d Cir. 1997).
Heck v. *Kenyon College*, 12 F. Supp.2d 728 (S.D. Ohio 1998).
Hines v. *Ohio State University*, 3 F.Supp.2d 859 (S.D. Ohio 1998).
Kimel v. *Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998). cert. granted 119 S.Ct. 901 (1999).
Kuhn v. *Ball State University*, 78 F.3d 330 (7th Cir. 1996).
McDonnell Douglas Corporation v. *Green*, 411 U.S. 792 (1973).
Naftchi v. *New York University*, 14 F. Supp.2d 473 (S.D.N.Y. (1998).
O'Connor v. *Consolidated Coin Caterers Corporation*, 517 U.S. 308 (1996).
Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996).
Usery v. *Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976).

Articles and Books

Leatherman, C., "End of Mandatory Retirement Has Led to Few Problems—Yet, Studies Find," *Chronicle of Higher Education*, May 29, 1998 at A14.
Note, "Questioning the Age-Old Wisdom: The Legality of Mandatory Retirement of Tenured Faculty under the ADEA," 105 *Harvard Law Review* 889 (1992).
Sampen, D. R., "Age Discrimination and Reasonable Non-Age Factors," 24 *Journal of College and University Law* 1 (1997).
Thro, W.E., "The Eleventh Amendment Revolution in the Lower Federal Courts," 25 *Journal of College and University Law* 501 (1999).

Interrogatories

Sexual Harassment of Students by Faculty

"Interrogatories" is a column that responds to readers' questions. Send questions to: Lex Collegii, P.O. Box 150541, Nashville, Tennessee 37215-0541. Recently we received an inquiry on university responses to allegations of sexual harassment of students by faculty.

Question: I understand the Supreme Court recently addressed the liability of institutions for faculty-student harassment under Title IX.
Answer: The Supreme Court ruled in Gebser v. Lago Vista Independent School District that a student could obtain damages from a school for such sexual harassment.

Question: What must the student do?
Answer: According to the court, the student must prove a school "official . . . who at a minimum has authority to institute corrective measures on the school's behalf has actual notice of and is deliberately indifferent to the teacher's misconduct."

Question: Did the Supreme Court provide any guidelines?
Answer: A few. The Supreme Court did not apply the deliberately indifferent standard to the facts of Gebser, but it did state that if a proper official "refuses to take action" or if there is "an official decision by the recipient not to remedy the violation" that such behavior could meet the Gebser test.

The Supreme Court also cited a case involving a police officer who allegedly subjected a woman to excessive force. The court noted that deliberate indifference in that situation would involve an official's "consciously disregarding an obvious risk that [another] would subsequently inflict a particular injury."

Question: What else is known about the "deliberately indifferent" standard?
Answer: Courts will continue to grapple with the test in fact-specific cases.

Question: What else do we know about how the courts approach this standard?
Answer: A recent federal district court decision involving a professor and his alleged harassing activities toward a number of students over several years assessed whether the college was liable because it was deliberately indifferent to the professor's misconduct.

Question: What did the court do?
Answer: The court reviewed a number of cases where courts have applied standards similar to the Gebser test and ruled that under Title IX, teacher student sexual harassment is only actionable if a school official with "actual knowledge of the abuse" and "the power to take action that would end such abuse . . . failed to do so."

In another case involving a public university, a federal court of appeals ruled:

School officials faced with knowledge of sexual harassment must decide how to respond, but their choice is not a binary one between an obviously appropriate solution and no action at all. Rather, officials must

(continued on page 8)

(continued from page 7)

choose from a range of responses. As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.

Question: What does this mean for colleges and universities?
Answer: It means that all sexual harassment complaints must be taken seriously and, in almost all cases, thoroughly investigated. For an administrator, the key issue will focus on the appropriate strategies to deal with the harassment. There is a wide range of responses available to colleges other than dismissal. Some of these responses may include . . . reprimands, counseling, community service, reduction in salary, and leaves of absence.

The Gebser test will be continually examined by the courts as will the colleges' "responsive strategy" to faculty-student harassment.

—*Kent M. Weeks*

IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL PERSON SHOULD BE SOUGHT.

General Board of Higher Education and Ministry
The United Methodist Church
P.O. Box 871
Nashville, Tennessee 37202-0871

Lex Collegii ISSN 0749-9078 is published quarterly, spring, summer, fall, and winter by College Legal Information, Inc. **Lex Collegii** is a registered trademark of College Legal Information, Inc. **Lex Collegii** is provided free to United Methodist-related college and university personnel; for others there is a subscription rate. All subscription inquiries and general correspondence should be addressed to:

Lex Collegii
College Legal Information
P.O. Box 150541
Nashville, Tennessee 37215

Copyright © 1999 by the General Board of Higher Education and Ministry, The United Methodist Church, P.O. Box 871, Nashville, Tennessee 37202.